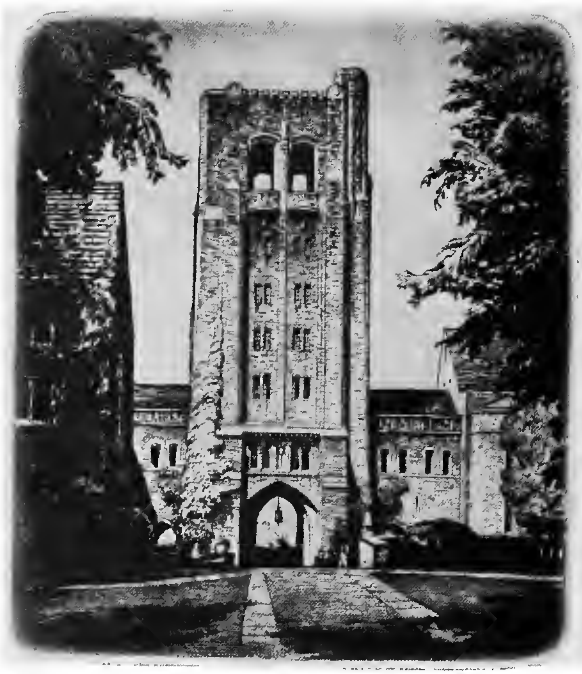

A TREATISE

ON

CONTRACTS FOR FUTURE DELIVERY

AND

COMMERCIAL WAGERS,

INCLUDING

"OPTIONS," "FUTURES," AND "SHORT SALES."

BY

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PREFACE.

There is a widespread opinion that much of the business done on the exchanges is illegal, in that it violates the law against gambling. This is largely due to the fact that a proper distinction is not made between regular purchases and sales for future delivery and "bucket shop" business.

There is, however, a vast difference between legitimate speculation and gambling. That the former is beneficial to the country at large, can hardly be disputed by even a casual observer. It has built the railways, stimulated the production of our grain and cotton, and developed our mineral and oil resources.

There may be, and often is, wild and reckless speculation in "short sales," "options," and "futures," as contracts of this character are easily adapted to such use. Ambitious men with small capital are enabled through them to buy beyond their ability to pay, or sell beyond their means of purchasing; and foolish and inexperienced men buy or sell at great loss because they have miscalculated the market or do not understand the principles of trade. But these are only incidents. Speculation itself is the mainspring of commercial activity, and should be encouraged rather than condemned.

There is no inherent vice in "short sales" and other contracts for future delivery, and they are recognized throughout the commercial world. On the other hand, wagering upon the market price of stocks and commodities cannot be

too severally condemned, and it must be admitted that the forms and methods of doing business on the exchanges are frequently prostituted to the worst kind of gambling. The "bucket shops" under cover of these forms and methods carry on their nefarious trade. They deal purely in "differences" under the form of "short sales," "options," and "futures," and thus it is that all contracts of that character have become associated in the public mind with gambling.

In the following pages I have endeavored to present the principles and decisions of the courts respecting this subject, and although the law is far from being settled, and the decisions in many cases are contradictory and unsatisfactory, yet I have endeavored to classify and harmonize them, and if the distinction between open board of trade transactions for future delivery and "bucket shop" business has been made clear, the object of my work will have been accomplished.

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Where a broker or commission merchant, in pursuance of instructions from his principal, buys or sells, or both, for future delivery, and in so doing makes contracts in his own name which may be enforced against him, he is entitled to his commissions and to indemnity for his disbursements, including losses paid, and may maintain an action therefor 232
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Where a broker or commission merchant, in pursuance of authority makes, in his own or his principal's name, contracts which are in form for the purchase or sale of stocks, securities, or commodities, but which are, in fact, wagers upon the market price of the same, he is entitled to recover from his principal his disbursements, including losses paid, and commissions, provided the transactions occur and the action is brought in England or in States where wagers are merely void and not unlawful 277
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CONTRACTS FOR FUTURE DELIVERY

AND

COMMERCIAL WAGERS.

CONTRACTS FOR FUTURE DELIVERY.

CHAPTER I.

WAGERS.

Wagers Defined.—A wager is defined to be "a contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event."[1] To constitute a wager there must be a risk on both sides.[2] "A wager is something hazarded on the issue of some uncertain event; a bet is a wager."[3] A wager is an agreement having all the requisites of a legal contract; parties, consideration, subject-matter, and the meeting of minds. The consideration is the mutual promise of each party to pay, or deliver to the other, in case he loses, the money or thing depending upon a contingent event. Such mutual promises have always been considered good considerations for each other.[4]

The peculiarity of this contract is, that its performance is in the alternative, that is by one party or the other according as one or the other loses. Hence in Shumate's case,[5] the Court defined a wager to be a con-

[1] 2 Bouvier's Dict. 647.

[2] Quarles *v.* The State, 5 Humph. 561.

[3] Cassard *v.* Hinman, 1 Bosw. 207.

[4] 1 Parsons on Contracts (5th ed.), 448.

[5] 15 Gratt. 653.

tract upon a contingency by which one may lose, although he cannot gain, or the other gain, but cannot lose. In plainer language this means that there is no mutual advantage to the contracting parties; it is all loss to one party and all gain to the other. Blackstone divided considerations for contracts into four species: First, "*Do, ut des*," as where I give money or goods on a contract that I shall be repaid money or goods for them again: Second, "*Facio, ut facias*," as when I agree with a man to do his work for him, he will do mine for me: Third, "*Facio, ut des*," as where a man agrees to do anything for a price to be given him: Fourth, "*Do, ut facias*," as where a person agrees with a servant to give him wages for his services. In each of these classes it will be observed that each party receives a benefit from the other. If a person having money and wanting a home employs a person to construct him a house, both parties are benefited by the contract; but if, out of idle curiosity or evil disposition, a contract is made that one party will pay to the other a certain sum of money, if a certain woman is found to be single, and the other is to pay the same amount if she be married, here the party losing gets no possible benefit. Such a contract is, however, perfect in law, and has every legal essential, yet it is vicious, because there is no mutual advantage, and it is this evil feature which has led the courts to regret that they ever enforced or sanctioned them, and the legislatures to make them void, and in some States to punish the parties to them.

Wagers at Common Law.—Wagers at common law are valid and enforcible in the courts. That they were idle did not affect their legality. There are

many exceptions to this rule founded on principles which make other contracts void. They have been held invalid on the ground of public policy, as where a wager was upon the result of a criminal trial,[1] or as to the method of playing an illegal game;[2] on the ground of creating disturbances and encouraging cruelty, as in the case of wagers upon the result of a dog fight,[3] or a cock fight,[4] or whether a horse could trot eighteen miles an hour;[5] on the ground that they tended to impair the purity of elections, as a wager upon the result of an election;[6] or because in restraint of marriage, as a wager that a person would not marry in a certain number of years;[7] or because provocative of public scandal, as whether an unmarried woman had a child,[8] or whether adultery had been committed,[9] or whether certain domestic relations existed.[10]

With these and like exceptions the common law recognizes and enforces wagers.[11] Notwithstanding the law upheld wagers, the courts frequently expressed regret that they had ever been sanctioned. Le Blanc, J., in Gilbert *v.* Sykes,[12] said: "It is often

[1] Evans *v.* Jones, 5 M. & W. 77.

[2] Brown *v.* Leeson, 2 H. Bl. 43.

[3] Edgerton *v.* Furzeman, 1 C. & P. 613.

[4] Squires *v.* Whisken, 3 Campbell, 140.

[5] Brogden *v.* Mariott, 3 Bing. (N. S.), 38.

[6] Parsons on Contr. (6th ed.), 755.

[7] Huntley *v.* Rice, 10 East, 22.

[9] Ditchburn *v.* Goldsmith, 4 Camp. 152.

[9] De Costa *v.* Jones, Comp. 729.

[10] Shirley *v.* Sankey, 2 B. & P. 130.

[11] Good *v.* Elliott, 3 Term R. 693; Gilbert *v.* Sykes, 10 East, 150; Atherford *v.* Beard, 2 Term R. 610; Morgan *v.* Pebrer, 4 Sco. 230; Hussey *v.* Crickitt, 3 Camp. 693.

[12] 16 East, 159.

lamented that actions upon idle wagers should ever have been maintained in courts of justice. The practice seems to have prevailed before that full consideration of the subject which has been had in modern times, and it is now clearly settled that the subject matter of a wager must be at least perfectly innocent in itself, and must not tend to immorality or impolicy." And Ashurst, J., in Atherford *v.* Beard,[1] expressed the opinion that "Perhaps it would have been better for the public welfare if the courts had originally determined that no action to enforce the payment of wagers would be permitted;" and Buller, J., in the same case, doubted if "it has ever been declared as a principle of common law that a wager between two persons not interested in the subject-matter was legal."

In the United States courts, in the case of Grant *v.* Hamilton,[2] it was held that a wager fairly made was recoverable at common law. In New York the early decisions[3] showed a tendency to sustain wagers as valid at common law. In California,[4] Delaware,[5] Illinois,[6] New Jersey,[7] and Texas,[8] the English common law prevails, except so far as it has been modified by statutes. In Pennsylvania it has been decided that wagers were

[1] 2 Term R. 610.

[2] 3 McLean, 100.

[3] Campbell *v.* Richardson, 10 Johns. 406; Bunn *v.* Riker, 4 Johns. 436.

[4] Johnson *v.* Hall, 6 Cal. 359; Jonson *v.* Russel, 37 Cal. 670.

[5] Dewees *v.* Miller, 5 Horr. 347; Porter *v.* Sawyer, 1 Horr. 519; Griffith *v.* Pearce, 4 Houston, 209.

[6] Richardson *v.* Kelley, 85 Ill. 491; Pettillon *v.* Hipple, 90 Ill. 420.

[7] Trenton Ins. Co. *v.* Johnson, 2 Zabr. 526.

[8] Dunman *v.* Strother, 1 Texas, 89; McElroy *v.* Carmichael, 6 Texas, 454; Wheeler *v.* Friend, 22 Texas, 683; Monroe *v.* Smeiley, 25 Texas, 486.

void as a part of the common law of the State, on the ground that they were contrary to the genius and policy of the people, and while admitting that wagers were valid at common law, the courts held that it was no part of the common law introduced into Pennsylvania by William Penn or his successors.[1] So in Vermont,[2] New Hampshire,[3] Maine,[4] Missouri,[5] and Massachusetts [6] wagers have been held to be invalid.

Statutes against Wagers.—In England, by statute, it is enacted: "That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager." [7]

In New York it is provided by statute[8] that "all wagers, bets, or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for or on account of any money or property, or thing in action so wagered, bet or staked, shall be void." In nearly every other State of the Union there are statutes against betting, gaming, and wagering, partially or wholly prohibiting the same, in many instances providing that all

[1] Edgell v. McLaughlin, 6 Whar. 176; Phillips v. Ives, 1 Rawle, 36; Bruas' App. 55 Pa. St. 294.

[2] Collamar v. Day, 2 Vt. 144; Tarlton v. Baker, 18 Vt. 9.

[3] Clark v. Gibson, 12 N. H. 386; Winchester v. Nutter, 52 N. H. 507.

[4] McDonough v. Webster, 68 Me. 530; Gilmore v. Woodcock, 69 Me. 118.

[5] Waterman v. Buckland, 1 Mo. App. 45.

[6] Ball v. Gilbert, 12 Met. 399; Babcock v. Thompson, 3 Pick. 446; Sampson v. Shaw, 101 Mass. 150.

[7] 8 & 9 Vict. c. 109, sec. 18.

[8] Revised Statutes, vol. III, p. 1962.

money deposited or wagered may be recovered back, and the parties to them made liable to penalties and severe punishments.

As a general rule it may be stated that in this country all wagers are void, either at common law or made so by statute. In many of the States they are made unlawful by statute.

STATUTES AGAINST PECULIAR FORMS OF GAMBLING, AND AGAINST CONTRACTS IN THE NATURE OF WAGERS.

The English Statute against Options, paying and compounding Differences and Short Sales.—In 1734 an act known as Sir John Barnard's Act[1] to prevent "the infamous practice of stock jobbing" was passed, the preamble of which is as follows: "Whereas, great inconveniences have arisen, and do daily arise, by the wicked, pernicious, and destructive practice of stock jobbing, whereby many of his Majesty's good subjects have been and are diverted from pursuing and exercising their lawful trades and vocations, to the utter ruin to themselves and families, to the great discouragement of industry, and to the manifest detriment of the trade and commerce."

The statute then proceeds as follows: "That all contracts and agreements whatsoever * * * upon which any price or consideration in the nature of a price shall be given or paid for liberty to put upon, or to deliver, receive, accept, or refuse any public or joint stock, or other public securities whatsoever * * * and also all wagers and contracts in the nature of wagers, and

[1] 7 Geo. II, c. 8.

all contracts in the nature of puts and refusals, relating to the then present or future price or value of such stock or securities as aforesaid, shall be null and void to all intents and purposes whatsoever." The act then provides a penalty of five hundred pounds for a violation of this part of it, one-half to be paid to the crown, and one-half to the party prosecuting. Section 5 of said act provides as follows: "and for preventing the evil practices of compounding or making up differences for stocks or other securities bought, sold, or at any time hereafter to be agreed so to be, be it further enacted by the authority aforesaid, that no money or other consideration whatsoever (except as hereinafter provided) shall, from and after the first day of June, 1734, be voluntarily given, paid, had, or received, for the compounding, satisfying or making up any difference for not delivering, transferring, having, or receiving any public or joint stock, or other public securities, or for the not performing any contract or agreement so stipulated and agreed to be performed; but that all and every such contract and agreement shall be specifically performed and executed on all sides, and the stock or security thereby agreed to be assigned, transferred, or delivered shall be actually so done, and the money, or other consideration thereby agreed to be given and paid for the same, shall also be actually and really given and paid; and all and every person or persons whatever who shall, from and after the said first day of June, 1734, voluntarily compound, make up, pay, satisfy, or receive such difference money, or other consideration whatsoever, for the non-delivering, transferring, assigning, having, or receiving such stock, or other security so to be agreed to be delivered, trans-

ferred, assigned, had, or received, as aforesaid, shall forfeit and pay the sum of one hundred pounds * * * one-half to be paid to the crown and the other half to him who shall sue for the same." Section 8 of said act is as follows: "And whereas it is a frequent and mischievous practice for persons to sell and dispose of stock, and other securities, of which they are not possessed; be it enacted by the authority aforesaid, that all contracts and agreements whatsoever, which shall, from and after the first day of June, 1734, be made or entered into for the buying, selling, assigning, or transferring of any public or joint stocks or stock, or other public securities whatsoever, or of any part, share, or interest therein, wherein the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell, assign, and transfer the same, shall not, at the time of making such contract or agreement, be actually possessed of, entitled unto, in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee or trustees to their use, shall be null and void to all intents and purposes whatsoever." It then provides that any person violating the same shall forfeit five hundred pounds, one-half to the crown and one-half to him who prosecute; and further provided that any broker or agent who shall make or negotiate knowingly any such sale shall in like manner pay a penalty of one hundred pounds. This act applied only to public funds, and had no relation to other funds or to merchandise. This statute remained in force for one hundred and twenty-five years, and was repealed in 1860.

That public opinion on the subject had in the

meantime undergone a change is indicated by the preamble of the repealing act, which is as follows:[1] "Whereas an act was passed, in the seventh year of the reign of King George the Second, chapter eight, to prevent the practice of stock jobbing, and by another act, passed in the tenth year of the said King's reign, chapter eight, the said first mentioned act was made perpetual: and whereas the said acts impose unnecessary restrictions on the making of contracts for the sale and transfer of public stocks and securities, and it is therefore expedient to repeal the same; be it enacted by the Queen's most excellent Majesty, by and with the consent of the Lords spiritual and temporal, and commons, and present Parliament assembled, and by the authority of the same, as follows: 1. From and after the passage of this Act, the said two several acts before mentioned shall be, and the same are hereby repealed."

Act of Congress in reference to sales of gold for Future Delivery.—The Congress of the United States, in March, 1863, passed an act,[2] by which it was provided, that "all contracts for the purchase and sale of gold or silver coin and bullion, and all contracts for the loan of money or currency secured by pledge or deposit, or all other disposition of gold or silver coin of the United States, if to be performed after a period exceeding three days, shall be in writing or printed, and signed by the parties, their agents, or attorneys, and shall have one or more adhesive stamps, as provided in the act to which this is an amendment, equal in amount to one-half of one per centum, and interest at

[1] 23 & 24 Vict. c. 28.

[2] March 3, 1863, 2 Bright's Stat. at Large, 144; 12 U. S. Stat. 719.

the rate of six per cent. per annum on the amount so loaned, pledged, or deposited." This act was repealed in 1864.[1]

New York Statutes against Short Sales.—In 1812 an act was passed against stock jobbing as follows:[2] "That all contracts, written or verbal, hereafter to be made, for the sale or transfer, and all wagers concerning the prices present or future, of any certificate or evidence of debt due by or from the United States or any separate State, or any share or shares of the stock of any bank, or any share or shares of the stock of any company established, or to be established, by any law of the United States, or any individual State, shall be, and all such contracts are hereby declared to be absolutely void; and both parties are hereby discharged from the lien and obligation of such contract or wager; unless the party contracting to sell and transfer the same shall at the time of making such contract be in actual possession of the certificate, or other evidences of debt or debts, share or shares, or to be otherwise entitled in his own right or duly authorized or empowered by some person so entitled to transfer the said certificate, evidence, debt or debts, share or shares, so to be contracted for. And the party or parties who may have paid any premium, differences, or sums of money in pursuance of any contract, hereby declared to be void, shall and may recover all such sums, together with damages and costs, by action on the case, in assumpsit for money had and received to the use of the plaintiff, to be brought in any court of record."

[1] 13 U. S. Stat. p. 303; Laws U. S. 1864, ch. 173, § 173; see also Rev. of Statutes of U. S. 1874, 2d ed. (1878, p. 1085).

[2] 2 R. L. 187, sec. 18.

In the year 1830 this statute was re-enacted as follows:[1] "All contracts for the sale of stocks are void unless the party contracting to sell the same shall at the time of making such contracts be in the actual possession of the certificate of such shares, or be otherwise entitled thereto, in his own right, or to be duly authorized, by some person so entitled, to sell the certificate or shares so contracted for."

This statute, like all others of the same nature, failed in its desired effect, and in the year 1858 it was repealed by an act as follows: "No contract, written or verbal, hereafter made for the purchase, sale, transfer, or delivery of any certificate, or other evidences of debt, due by or from the United States, or any separate State, or of any share or interest in the stock of any bank, or of any company incorporated under any law of the United States, or of any individual State, shall be void, or voidable, for any want of consideration, or because of the non-payment of any consideration, or because the vendor at the time of making such contract is not the owner or possessor of the certificate or certificates, or other evidence of such debt, share, or interest."

In New York State, as the law now stands, there is no prohibition against short sales of stock or any other commodity, though there is a constant agitation of the matter in the General Assembly from year to year, which resulted last year[2] in the passage in the Senate of a stringent act against short sales.

The Massachusetts Statute against Short Sales.[3]—"Every contract, written or oral, for the sale or transfer of

[1] 1 Rev. Stat. 710, sec. 6.
[2] 1885.
[3] Gen. Stat. Mass. chap. 105, sec. 6.

a certificate or other evidence of debt due from the United States, or other separate State, or of any stocks, or of any share or interest in the stock of a bank, company, city or village incorporated under a law of the United States, or an individual State, shall be void, unless the party contracting to sell or transfer the same is, at the time of making the contract, the owner or assignee thereof, or authorized by the owner or assignee, or his agent, to sell or transfer the certificate or other evidence of debt, share, or interest, so contracted for." This statute is now in force.

The Pennsylvania Statute against Sales for Future Delivery.[1]—"If any person or persons, whatsoever, shall make or enter into any contract or agreement, written or oral, for the purchase, receipt, sale, delivery or transfer of any public loan or stock, or the stock of any corporation, institution, or company, or any security in the nature thereof, or of any share or interest in such loan or stock, or in the stock of any such corporation, institution or company, or other security in the nature thereof, or any bill, note or other obligation of any corporation, institution or company, created or authorized, or that may be hereafter created or organized as aforesaid, in which contract or agreement it may be stipulated or understood between the parties thereto, his, her, or their agent or agents, that the same may be executed or performed at any future period exceeding five judicial days next ensuing the date of such contract or agreement, then, and in every such case, such contract or agreement

[1] Laws of Pa. 1841, p. 398, sec. 6.

shall be and the same is hereby declared void." This act has been repealed.

The Illinois Statute against Options.—By the revised statute of Illinois[1] it is enacted that: "Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad, or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts and shall be void."

The Georgia Statute against Short Sales.—The Code of the State of Georgia[2] provides as follows: "A bare contingency or possibility cannot be the subject of sale, unless there exists a present right, in the person selling, to a future benefit; so a contract for the sale of goods to be delivered at a future day where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law, and can be enforced by neither party."

The Ohio Statute.—A statute was passed in May, 1885, by the General Assembly, which is very sweeping in its terms.

[1] Sec. 178.

[2] Sec. 2638.

By the first section it is provided that "all contracts and agreements, no matter by what name designated, by which any person shall contract or offer to sell, or to buy, or to offer to buy, flour, corn, wheat, or grain of any kind, or meat, fresh or salt, dry or green, smoked or not, the ownership of the same not being in the same, and has not the property on hand to deliver upon such sale, or when the purchaser of the same so contracting to buy or offering to buy the same has not the means to pay, or does not intend actually to deliver or receive and pay for the same, are hereby declared illegal contracts and agreements, against public policy, and null and void."

By the second section it is provided: "All such contracts, agreements, and offers to sell or buy, as well as all transactions in stocks, petroleum, the grains and provisions aforesaid, by margins, or futures, are made and declared gambling and criminal acts, whether the parties buying or selling, or offering to buy or sell, acts for himself, or as the agent or broker for any firm, company, or broker's office;" and further provides for conviction and punishment for a violation of this section.

By the third section it is provided that in order to convict a person of the offense described in section two, "it shall not be necessary to show that both buyer and seller exist or agree, but the crime shall be complete by showing an offer to sell, whether the offer to sell is accepted or not; and any person who shall communicate, receive, exhibit or display in any manner, any such offer to so sell or buy, or any statement or quotations of the prices of

any such margins, futures or options, are deemed and held to be an accessory thereto, and punished in the same manner as the principal; and any such company, corporation, or person remitting any such communications, reception, exhibit or display * * * shall be fined not less than five hundred dollars, nor more than one thousand dollars." The owner of buildings who knowingly permits any of the gambling acts aforesaid in his building is to be fined in the same manner.

Said act also provides that it shall not apply to legally incorporated produce exchanges, chambers of commerce, or boards of trade, or to members of said produce exchanges, chambers of commerce, or boards of trade, or their agents or employees, when transactions are done in accordance with the established rules of such exchanges, chambers of commerce, and boards of trade, and executed thereon, or to the persons so dealing with or through them, or to persons who shall only communicate, receive, or deposit quotations on said produce exchanges, chambers of commerce, or boards of trade, and shall not apply to or interfere with legitimate business transactions in the regular course of trade.

The history of these acts furnishes an interesting and instructive study, and taken as a whole they show how useless it is to legislate against the natural laws of trade. The English statute sought to prevent short sales in public funds, and compelled parties who made contracts for the future delivery of such funds to actually execute them, and prohibited contracts known as "puts," "calls," and "straddles." After lingering on the books for a century and a

quarter, scorned and violated every day, failing to accomplish the object desired, and injuring legitimate trade, the true result and effect of it was shown, and it was repealed. It is manifestly wrong and oppressive to punish parties making short sales, or to prohibit under severe penalties the making of optional contracts, and absurd to punish parties who, having in good faith made time contracts, settle them upon payment of the precise sum which the law in an action for their breach would compel them to pay.

The act of Congress in reference to gold sales, and the New York statute against stock jobbing, and the Pennsylvania statute against short sales, have all of them met with the same fate. It is true that the Massachusetts statute against short sales, and the Georgia statute against "futures," remain, but that either of these statutes prevent in any appreciable degree short sales or options in these States is extremely doubtful. They are like sumptuary laws and laws against the taking of usury, more honored in the breach than in the observance, and by honorable men would never be taken advantage of.

What will be the effect of the Ohio statute remains to be seen. It does not pretend to prohibit the settlement of contracts honestly made by the payment of differences, but is designed to destroy and prevent that abomination known as bucket shops, and business of a kindred nature. Such places are as pernicious as the veriest gambling hells, and every member and friend of the exchanges will heartily wish that they may be exterminated.

CHAPTER II.

WAGERS BETWEEN PRINCIPALS.

SALES for the future delivery of goods and securities are of frequent occurrence in the commercial transactions of to-day, and were always recognized where the seller had the possession and ownership of the articles sold. In the vast majority of cases, however, contracts of sales in early times were for present delivery, and there was little opportunity for controversy to arise in respect to executory sales to be performed by delivery in the future, yet it was formerly held that a party not having the possession or ownership of the goods could not make valid contracts for their sale.

In the progress of time and growth of business, the needs of manufacturers, and the natural desire of planters and farmers to dispose in advance of the goods and crops to be produced, made these contracts very common, and gave the opportunity for speculators to trade upon the prospective wants and productive capacities of the country, so that soon we had an enormous trade in selling and buying goods, crops and articles to be manufactured long before they had any existence.

That certain evils would naturally attend business of this character, cannot be denied, and opposition to it found expression in the several statutes against stock jobbing, short sales and options referred to in

Chapter I, some of which are still in force; and for a considerable time the courts attempted to make a distinction between sales for future delivery where the seller had the articles, and where he did not, holding in the latter case that they were unlawful. But to-day the right to sell where the seller has not the articles in possession, and has no means or expectation of obtaining them except by going into the market and buying when the time for delivery arrives, is not disputed, and that there is nothing immoral in this, the enlightened sense of the community and courts concede. The difficulty which has arisen, and is constantly growing, is the use which is made of the great opportunity this mode of dealing offers for reckless speculation and open gambling so rife at the present time under the forms of legitimate trade.

A sale of a commodity for future delivery on the produce exchange is called an "option," the option being merely as to the day within a given month or other limited time upon which delivery may be made or required. On the cotton exchange such a sale is called a "future."[1] On the stock exchange securities sold for future delivery are called "buyer's option," or "seller's option," as the case may be.

In all these cases actual delivery is contemplated and provided for by the rules of the several exchanges, and must be made on the last day of the time limited by the agreement, and may be made on any day during the time limited by the party having the option to do so.

[1] In Cunningham *v.* The National Bank of Augusta, 71 Ga. 400, the court in defining this term erroneously made it out to be a wager.

There is another class of options which will be spoken of hereafter as "pure options," being simply the privilege of making or demanding delivery, and are designated as "calls," "puts," and "straddles" or "spread eagles."

A call is a contract by which a party signing or making the same agrees, in consideration of a certain sum of money, to deliver at the option of the party named therein, or to his order, at a time named, certain securities or goods at a certain price.[1]

A put is of the same character, except that the party signing or making the same agrees that he will accept and pay for the securities or goods.[2]

A straddle or spread eagle is a combination of a put and a call, the owner having the right either to deliver to, or require the delivery from the maker the securities or goods designated in the contract.[3]

[1] The following is the form of a stock "call":

New York, 1886.

For value received, the bearer may call on me for shares of the common stock of the Railroad Company at per cent., any time in days from date. The bearer is entitled to all dividends or extra dividends declared during the time.

Expires 1886, at 1.45 p. m.

[Signed].

See other forms of "pure option" contracts in Chapter III.

[2] The following is the form of a stock "put":

New York, 1886.

For value received, the bearer may deliver me shares of the common stock of the Railroad Company at per cent., any time in days from date. The undersigned is entitled to all dividends or extra dividends declared during the time.

Expires at 1.45 p. m.

[Signed].

[3] The following is the form of a stock "straddle":

New York, 1886.

For value received, the bearer may call on the undersigned for shares of the common stock of the Railroad Company at per

These contracts have severally been held to be lawful and enforceable in the courts, though in some States there are statutes against them. It is inconsistent to say that such contracts are wagers; but whether, in a given case, a transaction in the form of either of these contracts is a real contract according to its terms or a cover for a wager, we propose now to consider.

THE TRUE TEST.

Where the parties to a contract in the form of a sale agree expressly or by implication at the time it is made, that the contract is not to be enforced, that no delivery is to be made, but the contract is to be settled by the payment of the difference between the contract price and the market price at a given time in the future,—such a transaction is a wager.[1] The form of

cent., any time in days from date. Or the bearer may, at his option, deliver the same to the undersigned at per cent., any time within the period named. All dividends or extra dividends declared during the time are to go with the stock in either case; and this instrument is to be surrendered upon the stock being either called or delivered.

Expires at 1.45 P. M.

[Signed].

[1] Grizewood *v.* Blane, 11 C. B. 526; Thacker *v.* Hardy, L. R. 4 Q. B. D. 685; *Ex parte* Phillips, *in re* Morgan, 9 Weekly Reports, 131; Rosewarne *v.* Billings, 15 C. B. (N. S.) 315; Knight *v.* Fitch, 15 C. B. 566; Waterman *v.* Buckland, 1 Mo. App. 45; Bryant *v.* Western Union Tel. Co. 17 Fed. Rep. 825; Kent *v.* Miltenberger, 13 Mo. App. 503; Whitesides *v.* Hunt, 97 Ind. 191; Irwin *v.* Williar, 110 U. S. 499; Pickering *v.* Cease, 79 Ill. 328; Lehmann *v.* Strasberger, 2 Wood's C. C. 554; Sawyer *v.* Taggart, 14 Bush, 727; Roundtree *v.* Smith, 108 U. S. 269; Hawley *v.* Bibb, 14 Reporter, 172; Union Nat. Bk. *v.* Carr, 15 Fed. Rep. 328; Cobb *v.* Prell, 15 Fed. Rep. 774; Clarke *v.* Foss, 7 Biss. 540; Bartlett *v.* Smith, 13 Fed. Rep. 263; *In re* Green, 7 Biss. 338; *Ex parte* Young, 6 Biss. 53; Rumsey *v.* Berry, 65 Me. 570; Gregory *v.* Wendell, 39 Mich. 337; Gregory *v.* Wendell, 40 Mich. 432; Tenney *v.* Foote, 95 Ill. 99; Beveridge

the sale is a mere cover; the real intention being to bet upon the market price at some future time, the sum wagered being the difference between the two prices as that may subsequently appear.

The essential elements, then, of such a transaction are: *First.* The form of a sale. *Second.* A contemporaneous agreement, express or implied, that the sale is not to be enforced. *Third.* That the transaction is to be settled by the payment of differences in the prices. That no delivery of the commodity pretended to be sold is to be made, is a result rather than an element.

As in every sale there is to be a delivery of the articles sold, and as there can be no completed sale

v. Hewitt, 8 Bradw. 467; Barnard *v.* Backhaus, 52 Wis. 693; Kingsbury *v.* Kirwan, 77 N. Y. 612; Yerkes *v.* Salomon, 11 Hun, 471; Cassard *v.* Hinman, 1 Bosw. 207; Wall *v.* Scheider, 17 Reporter, 700; Fareira *v.* Gabell, 89 Pa. St. 89; Smith *v.* Bouvier, 70 Pa. St. 325; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Cunningham *v.* First Nat. Bank of Augusta, 71 Ga. 400; Hatch *v.* Douglass, 48 Conn. 156; Third Nat. Bank *v.* Harrison, 10 Fed. Rep. 243; Justh *v.* Holliday, 11 Wash. R. 418; Lowry *v.* Dillman, 18 N. W. R. 4; Murry *v.* Ochletree, 59 Iowa, 439; Marshall *v.* Thurston, 3 Lea, 741; First Nat. Bank of Lyons *v.* Oskaloosa, 39 N. W. R. 255; Brown *v.* Speyers, 20 Gratt. 296; Ream *v.* Hamilton, 15 Mo. App. 577; McLean *v.* Stuve, 15 Mo. App. 317; Swart's Appeal, 3 Brewst. 131; Bruas' Appeal, 55 Pa. St. 294; North *v.* Phillips, 89 Pa. St. 278; Flagg *v.* Baldwin, 38 N. J. Eq. 219; Maxton *v.* Gheen, 75 Pa. St. 166; Bigelow *v.* Benedict, 70 N. Y. 202. See also generally, Lyon *v.* Culbertson, 83 Ill. 33; Logan *v.* Musick, 81 Ill. 415; Pixley *v.* Boynton, 79 Ill. 351; Tenney *v.* Foote, 8 Bradw. 594; Webster *v.* Sturges, 7 Bradw. 560; Gilbert *v.* Gauger, 8 Biss. 214; Gregory *v.* Wattowa, 58 Iowa, 711; Story *v.* Salomon, 71 N. Y. 420; Patterson's Appeal, 16 Reporter, 69; Williams *v.* Tiedman, 6 Mo. App. 269; Williams *v.* Carr, 80 N. C. 294; Wyman *v.* Fiske, 85 Mass. 238; Noyes *v.* Spalding, 27 Vt. 430; Porter *v.* Viets, 1 Biss. 177; Colderwood *v.* McCrea, 11 Bradw. 543; Cole *v.* Milmine, 88 Ill. 349; Shaw *v.* Clark, 49 Mich. 386; Melchert *v.* Am. Union Tel. Co. 11 Fed. Rep. 193; Dickson *v.* Thomas, 97 Pa. St. 278; Ruchizky v. De Haven, 97 Pa. St. 202; Hentz *v.* Jewell, 20 Fed. Rep. 592.

without a delivery, it is frequently said in the cases that the test to be applied to such a transaction is to inquire whether there was a delivery intended. This, however, is not strictly accurate, for if there were a sale really made, delivery must be intended. If, however, at the time a pretended sale is made, it is understood or agreed that no delivery to any one is ever to be made, the transaction would be a wager; but in that case there would really be no sale. It is therefore inaccurate to say a sale is rendered void by an agreement or understanding that the articles sold shall not be delivered. That is rather a result from the fact that a contract, though in the form of a sale, is in reality only a cover for a contract of wager. This will more clearly appear further on. The sale of a pure option, take for instance a "call," does not necessarily imply a delivery of the articles mentioned; in fact, the very object of the contract is to give the owner of the same the right to call for them or not as he chooses. And it should be remembered also that in contracts for future delivery the contract is not a contract of sale, but a contract to sell, and no right or title to any property follows from the contract. The right is purely in the fulfillment of an executory contract. The seller only agrees that he will deliver; and so it appears that the concurrent agreement that no delivery is to be made, destroys its character as a sale and makes it a cover for a wager. In Kingsbury *v.* Kirwan,[1] the rule is stated to be, that to render a contract for the purchase and sale of property void, as a wagering contract, it must appear to have been the understanding when the contract was made that the

[1] 77 N. Y. 612.

property was not to be delivered, and only the difference in the market prices should be paid or received. This was doubtless accurate enough for the purposes of that case, but it is manifestly contradictory to say that a contract of purchase and sale is a contract of wager, and this the learned court does not intend to say, though it apparently does so. In Story *v.* Salomon,[1] the court, in speaking of a "call," said: "Such a transaction, unless intended as a mere cover for a bet or wager on the future price of stock, is legitimate and condemned by no statute."

The real test is whether the contract in form of a sale is merely colorable and really a cover for a wager; and the law says, if it is, the cover must be brushed away, and the parties left to whatever rights they may have under the contract of wager. In such a case the contract of sale is merely fictitious, and of course there is an agreement, express or implied, that no delivery under the fictitious sale is to be made, and the difference between the market price at the time the wager is made and the time of the event is the amount to be paid; and it is because this amount is unknown and uncertain that brings the case within the statutes against gaming and wagering. Let us call wagers of this character commercial wagers to distinguish them from ordinary bets. Contracts other than sales may be made the assumed form of commercial wagers.

Instances of Commercial Wagers.—In the leading case of Grizewood *v.* Blane,[2] the plaintiff was a stock and share jobber in London, and the defendant had,

[1] 71 N. Y. 420. [2] 11 C. B. 526.

through the broker, made contracts with the plaintiff for the purchase and sale of shares. The method pursued seems to have been, that the defendant sold at a given price, and subsequently purchased a like amount of the same shares. As a necessary consequence of this there would be nothing but the difference to settle between the parties, and no shares passed between them. There had been former dealings of the same character between the parties. The Chief Justice said: "The question here is, whether there was any contract of sale at all, and whether the transaction was not a mere bet upon the future prices of the commodity," and Cresswell, J., said: "Each party meant to break the contract, and give to the other a remedy against him for the difference in price, according as the market value might rise or fall." The jury was told that if neither party intended to buy or sell it was no bargain, but a mere gambling transaction, and as to the evidence, he thought it abundantly warranted the jury in coming to the conclusion that there was no real contract of sale; and Williams, J., said: "There was ample evidence of a mutual understanding between the plaintiff and defendant that the contract of sale was colorable only."

In Waterman *v.* Buckland,[1] the parties made an agreement which they called an option sale, but admitted that it was really a wager upon the market price of one thousand barrels of pork. Waterman purported to be the vendor and Buckland the purchaser of the pork, and it was agreed that if at the end of ninety days the price had fallen from what it was on the date of the transaction Waterman should

[1] 1 Mo. App. 45.

receive the difference, and if it had risen he was to pay the difference to Buckland. Each party placed his check in the hands of a stakeholder for one thousand dollars, and a so-called settlement was to be made at the end of ninety days. It was averred in the complaint that the price had fallen, and Buckland claimed five hundred dollars as the difference in price, and demanded judgment on the grounds that in Missouri wagers were not unlawful. The court decided that, although wagers in that State were not illegal in the sense of being criminal, they were *contra bonos mores* and void, and refused to enforce the contract. This case is remarkable as an illustration of what the facts should be in every case where it is claimed that transactions in the form of sales are in reality wagers.

In Bryant *v.* Western Union Telegraph Co.,[1] it appeared that the Chicago Board of Trade gave the Western Union Telegraph Co. permission to be on the floor and report the current transactions of the Board, on the condition that these reports should not be published to or for the use of any organization or persons in the city of Chicago or elsewhere, who would publicly publish or post the said quotations with the view of making transactions with other persons based upon them. Notice was given designed to prohibit the defendant furnishing, after the first of January, 1883, the current quotations of the Board to those who carried on trade or business in places known as "bucket shops." An injunction was obtained in the Louisville Chancery Court to restrain the defendant from removing from complainant's office a machine called a ticker, by which was furnished to the complainants by the Telegraph Co. re-

[1] 17 Fed. Rep. 825.

ports of the daily transactions which take place on the Chicago Board of Trade. On a motion to dissolve the injunction, the character of the complainants' business, and whether they kept a place known as a bucket shop, was fully considered. The complainants exhibited a form of contracts which they use in their trade, and insisted that it was legal, and that they did a legitimate business. The defendant, however, insisted that the form of the contract exhibited, if legal, was a cover, and that the complainants' business is really that of betting and taking bets upon the fluctuations of the market prices of grain, produce, etc., and that they carry on what is commonly known as a "bucket shop." The course of business pursued by the complainants was found to be this: They never buy or sell for present delivery, but always deal in futures and upon margins. Whenever the required margin is placed in the hands of the complainants they will buy or sell, as the customer desires, grain, etc., at the last quotation of the Chicago Board of Trade, and this is always for the next or succeeding month's delivery; and the deal is taken by the complainants themselves. The customer must always keep his margins good without notice that they are impaired, and if, at any time before the time fixed for delivery, the market in Chicago goes against a customer to the extent of his margin the deal is closed, and the complainants take the margin. The customer is not personally liable on the contracts made for him, the extent of his loss being his margin. If, however, the market should go in favor of the customer, he may call for a settlement at any time without regard to the maturity of his contract, and he is then paid the difference between

the market price and the price at which he bought or sold, less a sum which is called by the complainants a commission. The court said: "If 'bucket shop' means a place where wagers are made upon the fluctuations of the market prices of grain and other commodities, then I think the evidence shows the complainants keep such a 'shop,' and are of the class to which the defendants are prohibited from furnishing the market quotations of the Chicago Board of Trade. This is gambling, and a very pernicious and demoralizing species of gambling, which a court of equity should not protect even if the board of trade had not taken the action it has." And in speaking of the so-called commission the court said: "This sum, which is one quarter of a cent on each bushel of grain which is alleged to be bought or sold, is not 'a commission,' as the complainants always take the deal themselves, and do not pretend to buy or sell to others for the account of the customer, but is really the odds which the customer gives them in the wager on the future of the market. It is perhaps true, that if a customer keeps his margin good, so that he cannot be closed out, and does not exercise his right to settle upon the basis of the difference in the price of grain, etc., he can demand compliance with the contract and a delivery, but if the course of business between the complainants and their customers is to settle their alleged contracts by the payment of differences in the market rates, the fact that a customer may, under certain circumstances, require an actual delivery, does not relieve the complainants from the charge of carrying on a 'bucket shop.' It is the general course of a man's business which defines and classifies it."

Chandler's case[1] is an interesting one. It appeared "that in the month of May, 1872, and for several years prior thereto, Peyton R. Chandler, and the firm of Chandler, Pomeroy & Co., were engaged in the business of buying and selling grain on the Chicago market, and as members of the Board of Trade of this city; that Chandler, Pomeroy & Co. were brokers and commission merchants, and Peyton R. Chandler dealt mainly on his own account as a capitalist, through Chandler, Pomeroy & Co., who acted as his brokers; that about the middle of May, Peyton R. Chandler conceived the idea of making a corner in oats for the month of June then ensuing, and with that view he purchased all the 'cash oats' as they arrived in the market, and took all the 'options' offered him for June delivery—his purpose being to own all the oats in the market, and compel those who had sold 'options' for June, to pay his price; or, in other words, to settle with him by paying such differences as should exist between the prices at which he purchased the options and the price he should establish for cash oats on the last day of June, when his options matured. In pursuance of this plan, he purchased, between the 15th day of May and the 18th day of June, 2,500,000 bushels cash oats, being all, or substantially all, the cash oats in the market, and also bought June 'options' to the amount of 2,939,400 bushels. The total amount of oats in store in this city on the 8th day of June was only 2,700,000 bushels, from which it will be seen that Chandler practically controlled the market up to that time, and the total amount received during the remainder of the month was only 800,000 bushels. As inci-

[1] *Ex parte* Young, 6 Biss. 53.

dental to and part of the machinery of this corner, Chandler also sold what are called 'puts,' or privileges of delivering to him oats during the month of June, for forty cents a bushel. These 'put' contracts are alike in form and are as follows:

"'Received of E. F. $50, in consideration of which we give him, or the holder of this contract, the privilege of delivering to us or not, prior to three o'clock P. M. of June 30th, 1872, by notification or delivery, 10,000 bushels No. 2 oats, regular receipts, at 41 cents per bushel in store; and if delivered we agree to receive and pay for the same at the above price.

"'CHANDLER, POMEROY & Co.,
P. R. C.'

"When Chandler commenced to buy oats with a view to the corner, the price in this market was about thirty-nine cents a bushel. After he took possession of the market he put the price to forty-one cents and upwards, and held it there till the 18th of June. In the meantime the price had declined in New York and other markets, so that oats to ship were not worth over thirty-three to thirty-five cents, and July options for this market were not worth over thirty-five cents. On the 18th of June Peyton R. Chandler and Chandler, Pomeroy & Co. failed, and the price declined before the close of business that day from forty-one to thirty, and continued to decline during the remainder of the month, so that at one time they were as low as twenty-six cents per bushel. Between the time of the failure and 3 o'clock, on the 30th of June, the holders of the puts claimed to have made tender to Chandler of the quantity of oats called for by their respective contracts, and the oats not being accepted and paid for, they sold them upon the market that day or the next, under the

rules of the Board of Trade, and have proved up their claims for the differences between the price named in the 'puts' and that for which they sold. The total amount of claims thus proved up is about $400,000, and the total amount received by the bankrupt for these puts was $19,000." Chandler made an assignment, and these claims were first allowed *pro forma* by the Register, and were referred by him to the court for its opinion. The proof showed "conclusively that the plans of Chandler, and the fact that he was manipulating the market with express reference to a corner in oats for June, were well known and understood on the Board of Trade, while the number of these 'put' claims, about one hundred and twenty-five, all, or substantially all, in favor of members of the board, show that the struggle between Chandler, who was endeavoring to hold up prices, and the sellers of the 'options' and holders of 'puts' who were endeavoring to break the price, was quite generally participated in by members of the board. In other words, it was notorious that Chandler was endeavoring to keep the prices at forty-one cents or upwards, while the sellers of 'options' and holders of 'puts' were endeavoring to break down the price."

The assignee attacked these claims upon the ground that they were fraudulent as against the other creditors of the bankrupt. The court, however, considered and decided the question solely on the ground that the contracts were wagers and therefore void, and said that each of the contracts were "in substance an assertion by the seller of the 'put,' that oats could not be purchased on that market before three o'clock P. M., of the 30th of June, for less than forty-one cents a

bushel, and an undertaking to pay the difference between forty-one cents and any market price. If he, Chandler, sustains the price at forty-one cents or above, he wins the half cent a bushel paid for the 'put,' because the holder will not deliver, while if the price goes below that named, he is to pay the difference. This is practically the contract. It is as manifestly a bet upon the future price of the grain in question, as any which could be made upon the speed of a horse, or the turn of a card. The evidence in this case shows that nearly all of the cases of settlement on 'put' or 'option' contracts the grain is never delivered, nor expected to be delivered, but the parties simply pay the differences as settled by the prices. But, if that were not so in all cases, it is clear that in this case no delivery of the grain was intended by these 'put' holders, because they knew that Chandler controlled all the oats in the market, and fixed the price, and that their only expectation for success depended on their being able to break the market before their time for delivery expired. * * * From the very nature of the transactions the interest of the holder of these 'puts' is to break down the price, and that of the seller to maintain it. The number engaged in this transaction, and the quantities involved, demonstrate that neither party expected any grain to be delivered. Chandler expected to hold up the price, in which event no grain would be offered him, and the other parties must have known that they could not get the grain to deliver, unless they first broke Chandler, as he held all the grain." The court, after commenting upon the great inadequacy between the price paid for these options, and the amount claimed for failure to re-

ceive the oats, said: "The total amount paid by the claimants in these cases was less than $19,000, and yet the amount they claim is within a fraction of $400,000 —a disparity between the consideration paid, and the sum demanded, which strikes the mind at once as so grossly inequitable that the judicial conscience is shocked, and revolts from being made the instrument for enforcing such outrageous injustice."

In Thacker *v.* Hardy,[1] a leading English case, this subject was very thoroughly examined. It was claimed by the defendant that contracts made for his account on the stock exchange of London were time bargains. In that country the expression "time bargains" in common parlance is used to designate wagers upon the price of stock, as in this country the expressions "options" and "futures" are used, though erroneously, to designate wagers in grain or cotton. The question in the case was, whether the contracts made by the plaintiffs for the defendant's account were time bargains in the objectionable sense, and in determining this the court had occasion to define what such a time bargain was, and Lindley, J., said: "A real time bargain is, I suspect, a very rare occurrence. Grizewood *v.* Blane,[2] offers an instance of one, and Cooper *v.* Niel,[3] as understood by the jury, afforded another, but what are called time bargains are, in fact, the result of two distinct and perfectly legal bargains, namely, first, a bargain to buy or sell; and, secondly, a subsequent bargain that the first shall not be carried out; and it is only when the first bar-

[1] L. R. 4 Q. B. D. 685; s. c. 27 W. R. 158.
[2] 11 C. B. 526.
[3] 13 Weekly Notes, 128.

gain is entered into upon the understanding that it is not to be carried out that a time bargain, in the sense of an unenforceable bargain, is entered into. Such bargains are very rare, and this is what I understand the witnesses to mean when they say that there are no such things as time bargains on the stock exchange." And Bramwell, L. J., said: "A time bargain, merely because it is one, is not invalid. If a man were to undertake to sell me a crop of apples for next year that is not invalid, but when, by a time bargain, you understand something different in reality from what it purports to be, and that it purports to be an agreement to deliver and sell an article on a particular day, it is really no such agreement, but is an agreement to pay what shall be the difference between the price when the bargain is made, and the price at the future time they name; such an arrangement is something in the nature of a wager or gaming on the question of what would be the price."

In the case of Kent *v.* Miltenberger,[1] the court in speaking of the ordinary grain option contracts made on the Merchants' Exchange of St. Louis said: "It appears that delivery is always contemplated, not as a thing which will be necessarily insisted upon, but as a thing which the purchaser may insist upon. It sufficiently appears that this is the one thing which gives vitality to such contracts. * * * The circumstance which renders these contracts unlawful is a contemporaneous agreement that they shall not be executed by a delivery, but only by a settlement of differences. Unless there is such an agreement it is idle to talk about the gain-

[1] 13 Mo. App. 503.

bling intent, or wagering intent, or bets upon the future state of the market."

And in the case of Whitesides *v.* Hunt,[1] the learned court, in commenting on the case of Kent *v.* Miltenberger, says: "A contract to sell a commodity for future delivery, coupled with the express agreement, made at the time, that the commodity, at the maturity of the contract, shall not be paid for or delivered, but shall be settled for by the difference in prices, is no contract of sale at all. And well may the learned judge in that case admit that such a contract is illegal and void."

In Irwin *v.* Williar,[2] the court said: "If, at the time of entering into a contract for the sale of personal property for future delivery it be contemplated by both parties that at the time fixed for delivery, the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager and nothing more."

Pickering *v.* Cease,[3] is a good illustration of two contracts being made with the intent that one should neutralize the other. The court said: "There is no sufficient evidence that any grain was, in fact, bought for the defendants for delivery in August or September. So far as anything is proven, the alleged purchases were purely fictitious. The grain plaintiffs bought of Hutchinson was immediately sold back to him. It was not paid for, nor was it expected by the parties that it could be called for or delivered. The parties were merely speculating in differences as to the market value of grain on the Chicago market. Such

[1] 97 Ind. 191.
[2] 110 U. S. 499.
[3] 79 Ill. 328.

contracts are void at common law, as being inhibited by a sound public morality. They were in no just sense contracts with the privilege of the seller to deliver at a future day."

In Clarke *v.* Foss,[1] it was held that the intention that such a transaction should be a mere bet on the market, must constitute an integral part of the contract, and the court said: "If the contracts were void at all, they must have been void when made. The subsequent conduct of the parties may, and should be considered as evidence tending to show what the real contracts were when entered into; but if they were originally valid, no subsequent act of the parties can have the effect to render them obnoxious to the taint of illegality, as being gambling contracts."

In all these cases we find that the contracts of sale were purely fictitious and formal only, or else if they could be considered as real they were neutralized by contemporaneous contracts. It must follow then, as a necessary consequence, that it was understood there was to be no delivery made. There is no difficulty whatever in dealing with the transactions of this character, for there could be no pretense that they were real sales. It has been decided, however, in a number of cases, that there need not be an express agreement that the formal contract was simply a cover for a wager. This may be implied, and the jury may find it from the extrinsic circumstances of the case. Whether this agreement is expressed or implied the contract of sale itself must be found to be fictitious and merely a cover for a wager, and the real character of the transaction is to be determined by the

[1] 7 Biss. 540.

intention of the parties as to whether the contract of sale is to be executed or not.

In the recent case of Whitesides *v.* Hunt,[1] the court says: "There is a difference, and a distinction must be made, between a contract where there is a *bona fide* intent to fulfil the agreement according to its terms, and those where the difference in the market price is to be paid. There can be no doubt but that sales of a commodity to be delivered at some future time are valid, but if the parties agree at the time of making the contract that no title to any property shall pass, or delivery be made, or when, from the nature of the contract, it must be apparent that the intent of the parties was such that at some specified future time the losing party should pay to the other the difference between the selling price at that time and the time of making the contract, it would be a contract which the law would refuse to enforce, for the reason that it is clearly a wager upon the price of the commodity at some future day. A contract to sell a commodity for future delivery, coupled with the express agreement, made at the time, that the commodity, at the maturity of the contract, shall not be paid for or delivered, but shall be settled for by the difference in prices, is not a contract of sale at all. The trouble arises where, at the date of the contract, there is no express agreement as to payment and delivery, and where these questions are to be settled by implication, based upon the understanding and intention of the parties.

The real question, then, is to be determined by the intention of the parties whether the contract of sale is

[1] 97 Ind. 191.

to be enforced or not. It is this intention which gives character to the transaction.

Contracts presumed to be valid.—It may be laid down as a general proposition that an agreement, having all the formal requirements of a good contract, will be presumed to be valid, and a construction that will support it, will be preferred to one that will avoid it. Lord Coke said,[1] that "whensoever the words of a deed, or of the parties without deed, may have a double intendment, and one standeth with law, and the other is wrongful and against the law, the intendment that standeth with the law shall be taken." And in Wing *v.* Glick,[2] Chief Justice Adams said: "We are not allowed to construe a contract so as to deprive it of all force if it is susceptible of any other construction."

This rule has been laid down and applied in many cases to a variety of transactions on the exchanges.

In Bigelow *v.* Benedict,[3] it was claimed that a "put" was a wager and void under the statute, but the court said: "If the contract in question was a mere device to evade the statute it was, as has been said, illegal, but the question here, is, does the contract, on its face, disclose an illegal transaction, and we are of the opinion that it does not, and that the defense of illegality was not established. The burden was upon the defendant to show the illegality of the contract, and this he did not do."

And in Story *v.* Salomon,[4] an action founded on a pure option contract, the court said: "We should not

[1] Coke on Littleton, 42, 183.
[2] 56 Iowa, 473.
[3] 70 N. Y. 202.
[4] 71 N. Y. 420.

infer an illegal intent unless obliged to. Such a transaction, unless intended as a mere cover for a bet or wager on the future price of stock, is legitimate and condemned by no statute, and that it was so intended, was not proved."

The Defense of Wager must be affirmatively made, and in many States affirmatively pleaded, and the burden of proof is upon the party alleging it.[1]—The case of Harris *v.* Tumbridge,[2] involved the consideration of a straddle which, as we have seen, is a combination of a put and a call. It was claimed by the defendant that such a contract was a gambling contract and prohibited by the New York Statute. The court said: "It may have been, but there is no proof that it was, and no such defense was pleaded. The contract was not of necessity a wagering contract. That it might have been, does not at all dispense with the necessity of proving that it was."

In Dykers *v.* Townsend,[3] it was said: "To avoid the contract as against the Stock Jobbing Act, the burden of proof is upon the party alleging the violation." And in Irwin *v.* Williar,[4] it was said: "The burden of showing that parties were carrying on a

[1] Bigelow *v.* Benedict, 70 N. Y. 202; Story *v.* Salomon, 71 N. Y. 420; Wing *v.* Glick, 56 Iowa, 473; Harris *v.* Tumbridge, 83 N. Y. 92; Dykers *v.* Townsend, 24 N. Y. 57; Irwin *v.* Williar, 110 U. S. 499; Rumsey *v.* Berry, 65 Me. 570; Whitesides *v.* Hunt, 97 Ind. 191; McIlvane *v.* Edgerton, 2 Robt. 422; Stebbins *v.* Leowolf, 3 Cush. 143; Tyler *v.* Barrows, 6 Robt. 104; Sawyer *v.* Taggart, 14 Bush, 727; Kent *v.* Miltenberger, 13 Mo. App. 503; Bartlett *v.* Smith, 13 Fed. Rep. 263; Gregory *v.* Wendell, 39 Mich. 337; Clarke *v.* Foss, 7 Biss. 540; Murry *v.* Ochletree, 59 Iowa, 435; Williams *v.* Tiedman, 6 Mo. App. 269.

[2] 83 N. Y. 92.

[3] 24 N. Y. 57.

[4] 110 U. S. 499.

wagering business, and were not engaged in legitimate trade or speculation, rests upon the defendant. On their face, these transactions were legal, and the law does not, in the absence or proof, presume that parties are gambling."

There are some cases which hold that the burden of showing the good faith in contracts for future delivery is upon the party claiming under them.

In the case of Barnard *v.* Backhaus,[1] the court, in considering the question whether certain contracts of sale were made in good faith, or whether they were wagers, said: "It may be safely assumed that parties will make such contracts valid in form; but courts must not be deceived by what appears on the face of the agreement. It is often necessary to go behind or outside of the words of the contract—to look into the facts and circumstances which attended the making of it—in order to ascertain whether it was intended as a *bona fide* purchase and sale of property, or was only colorable. And to justify the court in upholding such an agreement, it is not too much to require a party claiming rights under it to make it satisfactorily and affirmatively appear that the contract was made with an actual view to the delivery and receipt of grain, not as a violation of the statute against gambling, or as a cover for a gambling transaction." This case is cited with approval in Beveridge *v.* Hewitt.[2]

In Cobb *v.* Prell,[3] the court said: "It is the duty of courts to scrutinize very closely these time contracts, and if the circumstances are such as to throw any doubt upon the question of intention of the parties, it

[1] 52 Wis. 593.
[2] 8 Bradw. 467.
[3] 15 Fed. Rep. 774.

is not too much to require a party claiming rights under such a contract to show affirmatively that it was made with actual view of delivery and receipt of the grain;" and in Stebbins *v.* Leowolf,[1] it was held that, under the Massachusetts statutes against short sales, a vendor seeking to enforce a contract for the sale of stock must show that he owned it when he made the bargain.

These cases are contrary to a long line of authorities, and would not probably be followed in other States. The last case was disapproved in Dykers *v.* Townsend.[2]

INTENTION, A QUESTION OF FACT.

What the intention of the parties to a contract of sale is, as to whether it is to be enforced, is a question of fact.[3]

In Grizewood *v.* Blane,[4] there was a contract in the form of a sale of stock, but the Chief-Justice left it to the jury to say what was the plaintiff's intention, and what was the defendant's intention at the time of making the contract, whether either party really meant

[1] 3 Cush. 137.

[2] 24 N. Y. 57.

[3] Grizewood *v.* Blane, 11 C. B. 526; Whitesides *v.* Hunt, 97 Ind. 191; Gregory *v.* Wendell, 39 Mich. 337; Yerkes *v.* Salomon, 11 Hun, 471; Rumsey *v.* Berry, 65 Me. 570; Tenney *v.* Foote, 4 Bradw. 594; Beveridge *v.* Hewitt, 8 Bradw. 467; Cobb *v.* Prell, 15 Fed. Rep. 774; Fareira *v.* Gabell, 89 Pa. St. 89; Irwin *v.* Williar, 110 U. S. 499; Clarke *v.* Foss, 7 Biss. 540; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Gregory *v.* Wendell, 40 Mich. 432; Justh *v.* Holliday, 11 Wash. R. 418; Third National Bank of Lyons *v.* Oskaloosa, 39 N. W. R. 255; Melchert *v.* West. U. Tel. Co. 11 Fed. Rep. 193; Ream *v.* Hamilton, 15 Mo. App. 577; Bartlett *v.* Smith, 13 Fed. Rep. 263.

[4] 11 C. B. 526.

to purchase or sell the shares in question, telling them that if they did not the contract was, in his opinion, a gambling contract and void. This was held to be right. In Whitesides *v.* Hunt,[1] the court said: "The intention of the parties was a question to be decided by the jury," and in Gregory *v.* Wendell,[2] it was determined on appeal that it was error to withdraw this question from the jury.

In Bartlett *v.* Smith,[3] the action was to recover a sum claimed by the plaintiff as a commission merchant for a balance of account in the purchase and sale of wheat for future delivery for the account and benefit of the defendant. After the plaintiff had rested his case, the court was asked to instruct the jury to find a verdict for the defendant on the ground that the contracts made by the plaintiff were wagers. Judge Nelson said: "I decline to take this case from the jury. I think there is an underlying question of fact which they must determine, and that is, were the contracts legitimately entered into? were they contracts for an actual delivery of wheat? or were they mere subterfuges, and entered into on the part of the plaintiff and third parties for the purposes of promoting gambling transactions? That is an underlying question of fact which it seems to me the jury must determine."

A party may be interrogated directly as to his intention. This was decided in the case of Yerkes *v.* Salomon.[4] The defendant had sold to the plaintiffs three options, a put and two straddles for certain stocks. Before the contract matured the defendant failed, and the contracts were closed by the defendant

[1] 97 Ind. 191.
[2] 39 Mich. 337.
[3] 13 Fed. Rep. 263.
[4] 11 Hun, 471.

agreeing to pay a certain sum in settlement of them. The amount was not paid, and the plaintiffs brought suit to recover it. The defendant pleaded that the contracts were wagers. Upon the trial the plaintiff was asked, if, at the time the contracts were made, he intended to tender or call for the stocks. The question was excluded, but upon appeal the decision was reversed, and the question was held to have been proper, as tending to show the intent of the plaintiffs in making the contract, and that it was error to exclude the same. This case was cited with approval in Gregory *v.* Wendell.[1]

In Cassard *v.* Hinman,[2] the question asked was, "at the time of making the writings between you and Cassard, was anything said by Nathan, the broker, as to the performance by receipt and delivery of pork, or the settlement by the payment and receipt of the differences, and if so, what?" The question was excluded, and it was held to have been erroneously ruled upon.

THE UNLAWFUL INTENTION MUST BE MUTUAL.

To make a contract of sale a gambling transaction, it must appear that both parties concur in the illegal intent. This is stated directly or indirectly in nearly all the cases.[3]

[1] 39 Mich. 337.

[2] 6 Bosw. 14. See also Third National Bank of Lyons *v.* Oskaloosa, 23 N. W. R. 255; and *Ex parte* Young, 6 Biss. 53.

[3] Grizewood *v.* Blane, 11 C. B. 526; Lehmann *v.* Strassberger, 2 Woods' C. C. 554; Pixley *v.* Boynton, 79 Ill. 351; Whitesides *v.* Hunt, 97 Ind. 191; Wall *v.* Schneider, 17 Reporter, 700; Irwin *v.* Williar, 110 U. S. 499; Gregory *v.* Wendell, 39 Mich. 337; Beveridge *v.* Hewitt, 8

In Grizewood *v.* Blane,[1] the question left to the jury was, what was the intention of the plaintiff, and what was the intention of the defendant; and in Lehmann *v.* Strassberger,[2] the court said: "What effect can the mental purpose of Strassberger to pay, or demand differences, instead of delivering cotton, have upon the contract, when that purpose is unknown to the other contracting party?"

In Pixley *v.* Boynton,[3] the court said: "The intention of the parties gives character to the transaction, and if either party contracted in good faith, he is entitled to the benefit of his contract, no matter what might have been the secret purpose or intention of the other party;" and in Whitesides *v.* Hunt,[4] it was said: "If either party contracted in good faith he is entitled to the benefit of his contract, no matter what might have been the secret purpose or intention of the other."

In Wall *v.* Schneider,[5] the court said: "We are not aware of any adjudicated cases going to the extent of holding that the mere secret intention of one party to the contract, not communicated to the other party, is sufficient to invalidate such contract;" and in Irwin *v.* Williar,[6] it was said that "a transaction which on its face is legitimate cannot be held void as a wagering

Bradw. 467; Clarke v. Foss, 7 Biss. 540; Bartlett *v.* Smith, 13 Fed. Rep. 263; Gregory *v.* Wendell, 40 Mich. 432; Murry *v.* Ochletree, 59 Iowa, 435; First Nat. Bk. of Lyons *v.* Oskaloosa, 23 N. W. R. 255; Williams *v.* Carr, 80 N. C. 294; Williams *v.* Tiedman, 6 Mo. App. 269; Hentz *v.* Jewell, 20 Fed. Rep. 592; Frost *v.* Clarkson, 7 Cowen, 24.

[1] 11 C. B. 526.

[2] 2 Wood's C. C. 554.

[3] 79 Ill. 351.

[4] 97 Ind. 191.

[5] 17 Reporter, 700.

[6] 110 U. S. 499.

contract by showing that one party only so understood, and meant it to be. The proof must go farther, and show that this understanding was mutual."

THE INTENTION DETERMINED FROM ALL THE CIRCUMSTANCES.

The real intention of the parties is to be determined from a consideration of all the circumstances of the case.[1]

In Kirkpatrick *v.* Bonsall,[2] it was held that a pure option contract was not on its face a gambling contract, but its character might be weighed in connection with other evidence on the question whether the transaction was a gambling scheme. The court said: "A bargain for an option may be legitimate, and for a proper business object. We can imagine such cases. But it is evident such agreements can be readily prostituted to the worst kind of gambling ventures, therefore its character may be weighed by the jury in connection with other facts in considering whether a bargain was a mere scheme to gamble upon the chances of prices." In Barnard *v.* Backhaus,[3] it was said: "It may be safely assumed that parties will make

[1] Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Barnard *v.* Backhaus, 52 Wis. 593; Brand *v.* Henderson, 107 Ill. 141; Whitesides *v.* Hunt, 97 Ind. 191; Hawley *v.* Bibb, 14 Reporter, 172; Irwin *v.* Williar, 110 U. S. 499; Sawyer *v.* Taggart, 14 Bush, 727; Gregory *v.* Wendell, 39 Mich. 337; Tenney *v.* Foote, 4 Bradw. 594; Beveridge *v.* Hewitt, 8 Bradw. 467; Fareira *v.* Gabell, 89 Pa. St. 89; Tyler *v.* Barrows, 6 Robt. 104; Clarke *v.* Foss, 7 Biss. 540; Bartlett *v.* Smith, 13 Fed. Rep. 263; *In re* Green, 7 Biss. 338.

[2] 72 Pa. St. 155.

[3] 52 Wis. 593.

such contracts valid in form; but courts must not be deceived by what appears on the face of the agreement. It is often necessary to go behind or outside of the words of the contract—to look into the facts and circumstances which attended the making of it—in order to ascertain whether it was intended as a *bona fide* purchase and sale of property, or was only colorable;" and in Brand *v.* Henderson,[1] it was said: "A verbal contract may be explained by facts, circumstances or conversations, which shed light upon the meaning of its words. In such a case it is proper to ascertain such extrinsic facts as the parties had in view at the time the contract was made, in order to ascertain the true meaning of its words. So where the defendant had given his broker an order to buy a lot of grain for future delivery, to be purchased on the Board of Trade, and it was claimed that the transactions were gambling, it was held to be error to refuse to let the defendant, when sued on his alleged purchase, answer the question, as to what was said at the time the order was given about how the deal was to be settled."

In Whitesides *v.* Hunt,[2] it was held that all the circumstances and acts of the parties may be considered in determining their intention; and in Beveridge *v.* Hewitt,[3] the court said: "What the real intention of the parties was, and whether the form was merely colorable, and adopted for the purpose of covering up a series of gambling contracts, will be determined from all the circumstances of the case as disclosed by the evidence." In Hawley *v.* Bibb,[4] it was said: "What-

[1] 107 Ill. 141.
[2] 97 Ind. 191.
[3] 8 Bradw. 467.
[4] 14 Reporter, 172.

ever may be the form of the contract, if, from the nature of the transaction and the circumstances around it, it is apparent that the purpose is not to buy or sell the goods, and that no delivery of them is intended, but at the time appointed for delivery the transaction shall be closed upon the basis of the then market price of the goods, the losing party paying the difference, even though there be no statute denouncing it, such contract is void."

In Irwin *v.* Williar,[1] the court said: "We do not doubt that the question whether the transactions come within the definitions of wagers, is one that may be determined upon the circumstances, the jury drawing all the proper inferences as to the real intent and meaning of the parties."

FORM NOT REGARDED.

Where the real intention of the parties is to gamble, it makes no difference what form of contract is used, or what relation is assumed between the parties to cover this intention.[2]

[1] 110 U. S. 499.

[2] Grizewood *v.* Blane, 11 C. B. 526; Tenney *v.* Foote, 4 Bradw. 594; Barnard *v.* Backhaus, 52 Wis. 593; Beveridge *v.* Hewitt, 8 Bradw. 467; Whitesides *v.* Hunt, 97 Ind. 191; Yerkes *v.* Salomon, 11 Hun, 471; Everitt *v.* Knapp, 6 John. 331; Irwin *v.* Williar, 110 U. S. 499; Bryant *v.* Western U. Tel. Co. 17 Fed. Rep. 825; Byers *v.* Beattie, 16 Weekly Rep. 279; Rudolf *v.* Winters, 7 Mo. 125; *Ex parte* Phillips, *in re* Morgan, 9 Weekly Reports, 131; Thacker *v.* Hardy, L. R. 4 Q. B. D. 685; Webster *v.* Sturges, 7 Bradw. 56; Gregory *v.* Wendell, 39 Mich. 337; Story *v.* Salomon, 71 N. Y. 420; Hibblewhite *v.* McMorine, 5 M. & W. 462; North *v.* Phillips, 89 Pa. St. 250; Porter *v.* Viets, 1 Biss. 177; Gregory *v.* Wattowa, 58 Iowa, 711; Murry *v.* Ochletree, 59 Iowa, 435; Lowry *v.* Dillman, 18 N. W. R. 4; Melchert *v.* Western U. Tel. Co. 11 Fed. Rep. 193; *In re*

Thompson, J., in Brua's Appeal,[1] said: "Anything which induces men to risk their money or property, without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizing to the community, no matter by what name it is called." This remark has been quoted with approval in several cases.

In Tenney *v.* Foote[2] the court said: "The statute was enacted from motives of public good and to repress an evil, and no matter what form the transaction bears as to the terms of the contract, still, if the form be colorable only, and the real intention of the parties be that there is to be no sale of the article, no delivery or acceptance, but that the transaction is to be adjusted only upon differences, it is a gambling transaction within the meaning of the statute."

In Barnard *v.* Backhaus[3] it was said: "It will not do to attach too much weight or importance to the mere form of the instrument, for it is quite certain that parties will be astute in concealing their intention and the real nature of the transaction, if it be illegal."

In Beveridge *v.* Hewitt[4] the court said: "The form

Green, 7 Biss. 338; Everingham *v.* Meighan, 55 Wis. 255; Bartlett *v.* Smith, 13 Fed. Rep. 263; Kirkpatrick *v.* Bonsall, 55 Pa. St. 155; Hatch *v.* Douglass, 48 Conn. 116; Marshall v. Thurston, 3 Lea, 741; First Nat. Bk. *v.* Oskaloosa, 29 N. W. R. 255; Justh *v.* Holliday, 11 Wash. R. 418; *Ex parte* Young, 6 Biss. 53; Thomson *v.* Cummings, 68 Geo. 124; McLean *v.* Stuve, 13 Mo. App. 317; Ream *v.* Hamilton, 15 Mo. App. 577; Williams *v.* Carr, 80 N. C. 294; Tenney *v.* Foote, 95 Ill. 99; Amery *v.* Merryweather, 2 B. & C. 573; Williams *v.* Tiedman, 6 Mo. App. 269; Maxton *v.* Gheen, 75 Pa. St. 166; Ruchizky *v.* De Haven, 97 Pa. St. 202; Dickson *v.* Thomas, 97 Pa. St. 278; Flagg *v.* Baldwin, 38 N. J. Eq. 219; Colderwood *v.* McCrea, 11 Brad. 543.

[1] 55 Pa. St. 294.

[2] 4 Bradw. 594.

[3] 55 Wis. 593.

[4] 8 Bradw. 467.

of the contract, however, is by no means conclusive of the true nature of the transaction. That must be determined from the real intention of the parties. If it appears to be their intention that the property sold is not to be delivered, but that a settlement is to be ultimately made between them upon the basis of the difference between the contract and market price, it is, notwithstanding its form, a wagering contract, void at common law, and prohibited by our statute. * * * The statute against gambling cannot be evaded by assuming the livery of legitimate commerce. It matters not how nicely the forms adopted may be adjusted to legal requirements, if the transaction, when stripped of its covering, discloses what in substance is a bet or wager on the future price of grain or other commodity, it is a gambling transaction within the meaning of the statute."

And in Whitesides *v.* Hunt[1] it was said: "A contract in form for the purchase of wheat, to be delivered at a future day, with the intention of both parties that the property is never to be delivered, but that settlement shall be made by the payment of differences in price at the date fixed for delivery as compared with the purchase price, is a gambling contract and void as against public policy. * * * It is not the form, but the intent with which the scheme was planned."

In the case of Yerkes *v.* Salomon[2] the court said: "The form of the contract does not decide the question, because it would not be difficult to make the contract relating to a bet apparently lawful, while the intent with which it was entered into was to avoid or

[1] 97 Ind. 191.

[2] 11 Hun, 471.

evade the statute. It is not the form with which the trick or device is presented, but the intent with which it was planned."

In the case of Everitt *v.* Knapp,[1] a motion was made to set aside a judgment, entered upon confession, on the ground that the bond upon which the judgment was founded was given for a gaming debt, and the motion was granted.

In Irwin *v.* Williar,[2] it was said: "It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade."

In bucket shop business it appears that all of the transactions there made are in the form of purchase and sale, and purport to be made by the proprietor of the shop for, and on account of, the parties with whom they deal. They charge what they call commissions, thus in form establishing the relation of principal and agent between their patrons and themselves. In the case of Bryant *v.* The Western Union Telegraph Company,[3] the true character of these dealings and the real relation of the parties were shown, and they were held to be wagers between principals instead of purchases and sales by a principal through an agent.

In Gregory *v.* Wattowa,[4] the plaintiff had sold some real estate, and taken in payment six notes secured by mortgage. Three of the notes he sent to commission merchants in Milwaukee to secure advances by them in the purchase and sale of grain to

[1] 6 John. 331.
[2] 110 U. S. 499.
[3] 17 Fed. Rep. 825.
[4] 58 Iowa, 711.

be made by them for plaintiff's account. At the close of the business the plaintiff owed the commission merchants a large amount, and the notes were sold and transferred to John Johnson. An action in equity was brought by plaintiff to declare him the owner of the notes. The court said: "It was incumbent on the plaintiff to establish the allegations of the petition and show that notwithstanding his endorsement of the notes, he was still the owner of them. And in the face of his endorsements he could do this, if at all, only by showing that the purchases and sales of grain were illegal and void as being mere gambling transactions." The plaintiff failed in his proof, but the case is a good illustration of the proposition we are considering.

In Melchert *v.* Western Union Telegraph Co.,[1] the plaintiff had made through his factor at Chicago certain contracts for the sale of rye. He delivered to the operator at Davenport, Iowa, a despatch to be forwarded to his factor at Chicago concerning the rye. Through the neglect of the company in forwarding the despatch the plaintiff suffered and actually paid a large loss, and sued the company to recover his damages. The company defended on the ground that the transactions the plaintiff was engaged in were wagers on the price of rye, and prevailed in the defense.

In Everingham *v.* Meighan,[2] the parties were engaged in transactions which were found to be wagers. They were in the form of purchases and sales of grain by one as commission merchant of the other, and dif-

[1] 11 Fed. Rep. 193.

[2] 55 Wis. 355. See, also, Melchoir *v.* McCarty, 31 Wis. 252.

fering as to the amount of the account, a compromise was made, and a certain sum agreed upon as due to the commission merchant. It was argued that this made a valid claim, but it was held that no action could be maintained on a compromise of the amount of illegal claims.

In Byers *v.* Beattie,[1] the form assumed as a cover was a contract between a principal and agent, by which the former, as the broker of the latter, was to buy and sell shares for him. It appeared that the agreement between the parties was that the plaintiff should buy and sell such shares as the defendant should direct, and in case the prices at which the said shares should be sold, should be greater than those for which the same should have been bought, the plaintiff should pay the difference between the said prices less the plaintiff's commissions and charges, and that, in case the prices for which said shares should be sold should be less than the prices for which the same should have been bought, the defendant should pay the plaintiff the differences, together with the plaintiff's commission and charges. This was held to be a wager; the sole consideration for the defendant's promise to pay the difference between the price of the sale and the price of the purchase, in case the latter should be the greater, was the plaintiff's promise to pay the defendant the difference in case the former should be the greater.

In the later Pennsylvania cases,[2] in Flagg *v.* Baldwin,[3] and in Justh *v.* Holliday,[4] the relation of the

[1] 16 Weekly Reporter, 279.

[2] Fareira *v.* Gabell, 89 Pa. St. 89; North *v.* Phillips, 89 Pa. St. 250; Maxton *v.* Gheen, 75 Pa. St. 166; Ruchizky *v.* De Haven, 97 Pa. St. 202; Dickson *v.* Thomas, 97 Pa. St. 278; Patterson's Appeal, 16 Reporter, 59.

[3] 38 N. J. Eq. 219.

[4] 11 Wash. R. 418.

principal and broker, though claimed to exist, was found by the courts to be in fact mere covers for gambling in the price of stocks.

In Colderwood *v.* McCrea,[1] the plaintiffs brought an action to recover for money paid and commissions in the purchase of wheat on the Chicago board of trade. They acted as the commission merchants of the defendant. The court held that although the transactions were in the form of purchases and sales of wheat by agents for their principals, "the entire line of dealings were simply in differences, with no intention to deliver or receive and pay for the commodities which were the subject of the deals."

If, at the beginning of wagering transactions, money, notes, or bonds are given as security or margins, the money cannot be recovered back, and no action can be sustained on the notes;[2] and if the notes or bonds are secured by mortgage, the mortgage cannot be foreclosed, and may be set aside.[3] If, after the transactions are closed, there is an amount due to either party, an action to recover the same cannot be maintained.[4] Nor can actions on accounts stated,

[1] 11 Bradw. 543.

[2] Gregory *v.* Wendell, 39 Mich. 337; Gregory *v.* Wendell, 40 Mich. 432; Cunningham *v.* Third Nat. Bk. of Augusta, 71 Geo. 400.

[3] Flagg *v.* Baldwin, 38 N. J. Eq. 219.

[4] Grizewood *v.* Blane, 11 C. B. 526; Hibblewhite *v.* McMorine, 5 M. & W. 462; Whitesides *v.* Hunt, 97 Ind. 191; Williams *v.* Carr, 30 N. C. 294; Webster *v.* Sturges, 7 Bradw. 56; Porter *v.* Viets, 1 Biss. 177; Colderwood *v.* McCrea, 11 Bradw. 543; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; *Ex parte* Young, 6 Biss. 53; *In re* Green, 7 Biss. 338; Hatch *v.* Douglass, 48 Conn. 116; Irwin *v.* Williar, 110 U. S. 499; Byers *v.* Beattie, 16 Weekly Reporter, 279; Thacker *v.* Hardy, L. R. 4 Q. B. D. 685; *Ex parte* Phillips *in re* Morgan, 9 Weekly Reporter, 131; North *v.* Phillips, 89 Pa. St. 250; Bartlett *v.* Smith, 13 Fed. Rep. 263; Thompson *v.* Cummings, 68 Geo. 124.

notes,[1] due bills,[2] acceptances,[3] guarantees of third parties' notes,[4] mortgages,[5] or bonds given for the same, be sustained.[6] A judgment on a bond, entered upon confession, was set aside on the ground that the bond was given for a gaming debt.[7]

A negotiable instrument founded upon an illegal wagering consideration is void in the hands of all parties to whom it may come, even though negotiated before maturity, without notice, and for a valuable consideration.[8]

A distinction is made between the position of a *bona fide* holder of a negotiable note or other securities, which are void in the hands of the original payees, in a State where wagers are held to be void as against public policy, or made so by statute, and in a State where they are made unlawful by express provisions of the statute, or where securities founded upon such a consideration are made void in the

[1] Barnard *v.* Backhaus, 52 Wis. 593; Yerkes *v.* Salomon, 11 Hun, 471; Murry *v.* Ochletree, 59 Iowa, 435; Fareira *v.* Gabell, 89 Pa. St. 89; Lowry *v.* Dillman, 18 N. W. R. 4; Marshall *v.* Thurston, 3 Lea, 741; First National Bank *v.* Oskaloosa, 39 N. W. R. 255; Justh *v.* Holliday, 11 Wash. R. 418.

[2] Rudolf *v.* Winters, 7 Neb. 125.

[3] Williams *v.* Tiedman, 6 Mo. App. 269; Petrie *v.* Hannay, 3 Term R. 418.

[4] Tenney *v.* Foote, 95 Ill. 99.

[5] Barnard *v.* Backhaus, 52 Wis 593; Flagg *v.* Baldwin, 38 N. J. Eq. 219.

[6] Amery *v.* Merryweather, 2 B. & C. 573.

[7] Everitt *v.* Knapp, 6 Johns. 331.

[8] Barnard *v.* Backhaus, 52 Wis. 593; Whitesides *v.* Hunt, 97 Ind. 191; Tenney *v.* Foote, 4 Bradw. 494; Cunningham *v.* The Nat. Bk. of Augusta, 71 Geo. 400; Steers *v.* Lashley, 6 Term R. 71; Petrie *v.* Hannay, 3 Term R. 418; Justh *v.* Holliday, 11 Wash. R. 418; Lowry *v.* Dillman, 18 N. W. R. 4.

hands of subsequent holders of the same. In the former case he may maintain his action.[1]

Where part of the consideration is illegal the whole contract is void.[2] An entire contract partly illegal is wholly void.[3]

CAN A WRITTEN CONTRACT OF SALE FOR FUTURE DELIVERY BE SHOWN TO BE A WAGER BY PAROL EVIDENCE?

In some of the cases the statement that the right to qualify or nullify a contract of sale by showing an intention contrary to its terms, from the circumstances of the case, was limited to verbal contracts. In the case of Rumsey *v.* Berry,[4] the court said: "As the agreement was not in writing it might have been proper for the presiding justice, had he been so requested, to have defined a wagering contract and have left it to the jury to find whether by a fair inference from all the testimony this was within the definitions." And in Brand *v.* Henderson,[5] the court said: "A verbal contract may be explained by facts, circumstances, or conversations which shed light upon the meaning of its words. In such case it is proper to ascertain such extrinsic facts as the parties may have had in view at the time the contract was made, in order to obtain the true meaning of its words," and it was "held to be error to refuse to let

[1] Third Nat. Bk. *v.* Harrison, 10 Fed. Rep. 243; Cunningham *v.* Third Nat. Bk. of Augusta, 71 Geo. 400; Mitchell *v.* Catchings, 23 Fed. Rep. 710; Shaw *v.* Clark, 49 Mich. 384.

[2] Tenney *v.* Foote, 95 Ill. 99.

[3] Fareira *v.* Gabell, 89 Pa. St. 89.

[4] 65 Me. 570.

[5] 107 Ill. 141.

the defendant answer the question as to what was said at the time the order was given about how the sale was to be settled."

In Porter *v.* Viets,[1] the defendant made a contract in writing with plaintiffs by which he sold them fifteen thousand bushels of corn for future delivery. Both parties signed the contract. The corn not being delivered, suit was brought for damages. The defense was that it was not intended by the parties that the corn should be delivered, but that it was a contract for the payment of the difference between the price stated and the market value at the time mentioned for delivery; in fine, that it was nothing more than a wager between the parties as to the price of the corn at the time fixed on, and that the contract was only a cover for the real intent of the parties, which was merely to make a bet and nothing more. The court said: "The rule is well settled that when two men make a contract, and reduce it to writing, and sign it, that is *the contract* between them. It cannot be shown verbally that something different was intended at the time from what appears in the writing. It is a rule resting upon the soundest principles, and one of uniform application. Here is no fraud intended. The contract is free from doubt or ambiguity. It is to deliver a certain quantity of corn at a certain time for a certain price, all set forth in writing. The defendant says he wishes to show that the intention of the parties at the time was to make a wager on the price of corn during the last half of June, and that the amount of the wager and the party that was to win or lose was to depend upon the market

[1] 1 Biss. 177.

price of the corn. Now, it may be true that the result is precisely the same, that is, the one party loses and the other gains the same amount as in a wager. So it is in any case of this kind, when a party does not perform his contract. But that circumstance does not make the contract the same. In case of a wager on the price, where a man pays the 'difference,' he performs his contract; but if he does not fulfill the contract by paying the difference, he meets the penalty the law imposes for a breach of it. Here this defendant wishes to establish orally that another contract was made at the time not in writing, and which he alleges was illegal, in order to make out the illegality of the written contract. This cannot be done. No doubt all contracts which are illegal may be attacked, but no case has been shown which authorized a party to prove verbally that another contract (in itself illegal) existed, and so get rid of a written contract on its face unexceptionable."

In Hentz *v.* Jewell,[1] the action was brought upon promissory notes given, as was alleged in the plea, for money advanced by the plaintiffs to pay losses of the defendant's firm in dealing in cotton futures. The plaintiffs acted as commission merchants of D. A. Jewell & Bro. It was claimed that the cotton futures were gambling contracts. The court said: "To render the contracts invalid, there must, at the time of its creation, be a mutual understanding between the parties that no delivery is to be made, but only the differences in prices paid. Respectable authorities hold that when the contract is in writing, and such under-

[1] 20 Fed. Rep. 592.

standing is not expressed, that parol testimony is inadmissible to establish it. Such are the contracts proven in this case; and if this rule is applied it will cut off this defense."

On the other hand, in the same year, the case of Cassard *v.* Hinman,[1] a different conclusion is reached. This action was brought to recover damages for the non-fulfillment of an agreement, dated the 16th of May, 1866, in which the defendant agreed to sell to the plaintiffs five hundred barrels of mess pork, deliverable in the month of September, and cash at the rate of seventeen dollars per barrel to be paid on delivery. This contract was in writing. The defendant in his answer stated that it was not his intention to make any actual sale or delivery of pork to the plaintiffs, nor was it the intention of the plaintiffs to actually buy or receive any pork from him; that it was the mutual design and intention of the plaintiffs and the defendant at the time of making such contract that the same should not be specifically performed, in whole or in any part, but on the contrary, at the maturity of such supposed contract, the difference between the market value of the pork therein mentioned and the price of the same fixed in such contract should be paid by the one party to the other, as performance or satisfaction of said supposed contract, and claimed that this was illegal and void, and contrary to the New York statute. To this answer there was a demurrer on the ground of insufficiency. In the trial of the case at Special Term it does not appear by the report thereof that any question was made as to whether this intention could be shown by parol testimony, but on

[1] 1 Bosw. 207.

appeal to the General Term it was claimed by the plaintiff that this was a speculative contract merely, and not in the nature of a wager, and neither within the letter nor the intent of the statute against betting and gaming; that the contract on its face contains nothing contrary to the statute, and being in writing, cannot be varied or contradicted by parol evidence of an intention which must go to show that it was never to be performed, and that therefore the allegation of such an intent is not good in pleading, and does not raise the question of wager at all. The court said: "The rule which excludes parol evidence to contradict or vary the terms of a written instrument, applies to the construction of it only as a valid subsisting contract; but a party might always show that the instrument was void, either by reason of fraud, want of consideration, or as contravening a statute, or some express rule of common law, or as against public policy, and for other reasons. So infancy, coverture, and insanity may, when pleaded, be shown by parol to avoid a written agreement."

The case of Yerkes *v.* Salomon [1] was founded upon written contracts, and it being claimed that they were wagers upon their face, the court allowed parol testimony to show what the intention of the parties was as to delivery of the shares mentioned in the contracts. The question which we are now considering does not seem to have been raised in the case, but, as it stands, it is indirectly a strong authority in support of Cassard *v.* Hinman.

In Kent *v.* Miltenberger,[2] the court said: "There

[1] 11 Hun, 471.
[2] 13 Mo. App. 503.

was not only no agreement that the contracts which the plaintiff made for the defendant should be settled without delivery, but the contracts upon their face imported the contrary, and not a word was written or said indicating that it was the intention that the contracts should be in any respect different from what they purported to be on their face."

In Kirkpatrick *v.* Bonsall,[1] the action was for the breach of a written contract, which gave to the plaintiff the option to call upon the defendant to deliver certain oil. It was claimed that the contract was a mere wager on the market price of oil; and it was held that it was proper to ask the plaintiff, what other contracts he had made when he entered into this contract, to be followed by evidence of his financial inability to take and pay for the amount of oil specified in said contracts.

In Clarke *v.* Foss,[2] the facts were that C. B. Stevens & Sons had for many years shipped wheat and other grain for sale to the defendants, who were commission merchants in Chicago and members of the Board of Trade of that city, and had speculated from time to time in the Milwaukee market, and also in the Chicago market, through the defendants as their factors. Stevens & Sons ordered the defendants to make sales for them of grain for future delivery, which the defendants did by written contracts with third parties. These contracts were afterwards performed, or settled in a variety of ways, which it is not important now to notice. The losses were large, and, after being fully adjusted and paid by the defendants, Stevens & Sons

[1] 72 Pa. St. 155.
[2] 7 Biss. 540.

gave their notes to the defendants for the amount. Notes secured by mortgage were afterwards given by Stevens & Sons to the defendants for a portion of the losses paid by them. Two years afterwards Stevens & Sons went into bankruptcy, and an action in equity was brought by the assignee to set aside and cancel these notes and mortgages, on the ground that they were void, as being given to secure a consideration arising out of option contracts for the sale and delivery of grain which, it was claimed, were wagering contracts under the law of Illinois in force at that time. Upon the question we are now considering, the court said: "The contracts sought to be set aside are written contracts, and the mortgage is under seal. Nevertheless, the weight of authorities, and I think the doctrine, is that you may go behind the writing and show what the real intent and meaning of the parties were; and if it appears that the writing does not express the real intent of the parties, but is merely colorable, and used as a cloak to cover a gambling transaction, the court will not lend its aid to enforce the contract, however fair on its face; or if securities are given, as in this case, will interfere on the ground of public policy and for the public good, rather than for the purpose of believing a party who is himself *particeps criminis* in an inhibited transaction, to set aside such securities."

Wharton,[1] in his Law of Evidence, says: "It may be proved that the contract embodied by the writing is illegal, and therefore void. If void it is not a contract. To exclude parol evidence, because it is a contract, is to assume the very point in question. * * *

[1] Vol. II, sec. 935 (ed. 1879).

Nor can any form of contract of indebtedness preclude a debtor from setting up usury." This statement of the law is undoubtedly correct, but it does not fully cover the question we are considering. Admitting that any extrinsic fact may be shown to prove that a contract was made for an unlawful purpose, or that there was added to it something, which made it void on the ground of public policy, this is not equivalent to saying, that a contract of sale in writing may be shown to be no sale at all, by proving a contemporaneous parol agreement to that effect. Both of the agreements considered alone are perfectly valid. In each of the illustrations used in Cassard *v.* Hinman, and by Wharton, some extrinsic fact appeared which rendered unenforcible in law the contract made. In none of them was it pretended that the contracts made were really fictitious.

Upon the authorities, then, this question does not seem to be clearly answered. Not one of the cases cited was in a court of last resort, and until it is determined in such a court, where the issue is clearly made and decided, it is proper to consider the question upon its merits.

The reasoning of the court in Porter *v.* Viets seems to be more consistent, logical, and in accordance with the established rules of evidence. Greenleaf says:[1] "When parties have deliberately put their engagements in writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagements, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was re-

[1] Vol. I, sec. 275.

duced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversation or of declarations at the time it was completed, or afterwards, as it would tend, in many cases, to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected. In other words, the rule is more briefly expressed, 'parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.' * * * The writing,[1] it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, *no other words* are to be added to it, or substituted in its stead. The duty of the court in such cases, is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words expressed; but what is the meaning of words they have used. It is merely a duty of interpretation; that is, to find out the true sense of the written words as the parties used them; and of construction, that is, when the true sense is ascertained, to subject the instrument, in its operation to the established rules of law. And where the language of the instrument has a settled legal construction, parol evidence is not admissible to contradict that construction." In the State of New York, it has been decided by a large number of cases that "parol evidence is inadmissible to contradict or vary a written instrument."[2] "Where parties have reduced their intention to writing, the terms of the written instrument,

[1] Vol. I, sec. 277.

[2] 3 Abbott's Dig. 82.

if clear and unambiguous in themselves, are deemed to be the best evidence of what is intended. And the writing cannot be contradicted or varied by parol evidence aiming to show that something different was designed."[1] "A written instrument can no more be contradicted or varied in respect to its legal effect, than it could be in respect to its express terms."[1] "Contemporaneous parol stipulations, contradicting or varying the legal effect, are not admissible."[1] "Parol proof of acts of the parties under a contract clear and unambiguous in its terms, cannot be received to control the construction of the contract."[2]

The contracts which appear to have been made in the cases of Porter *v.* Viets, and Cassard *v.* Hinman, were clear and unambiguous in their terms, and being contracts of sale had a certain legal effect, and as the law stands in New York, as stated above, there does not seem to be any room for construction or interpretation. The contracts were contracts of sale, they were in writing, and, according to the rule laid down in Greenleaf, the duty of the court in such cases is not to ascertain what the parties secretly intended; and, according to the decisions of New York, the legal effect of a written contract cannot be contradicted by parol evidence. These principles seem to be conclusive of the question.

The court in Cassard *v.* Hinman proceeds upon the theory that this rule of evidence had no application to that case, and says: "The rule which excludes parol evidence to contradict or vary the terms of a written contract, applies to the construction of it only as a valid subsisting contract." And Greenleaf says:

[1] 3 Abbott's Dig. 82. [2] 3 Abbott's Dig. 83.

"The rule is not infringed by the admission of parol evidence, showing that the instrument is altogether *void*, or that it *never* had any legal existence or binding force, either by reason of fraud, or for want of due execution and delivery, or for the illegality of the subject-matter. * * * The *want of consideration* may also be proved to show that the agreement is not binding. * * * Parol evidence may also be offered to show that the contract was made for the furtherance of objects *forbidden by law*, whether it be by statute, or by an express rule of the common law, or by the general policy of the law."[1]

But the contract of sale which was proved to have been made in this case was a valid, legal, and subsisting contract. Its terms imported a legal obligation, there was no doubt or ambiguity in reference to it, and there was no want of consideration, nor was there anything illegal about the consideration, and unless violence is done to the plain meaning of English words, the rule must be applied to it. It remains then only to be considered whether "the contract was made for the furtherance of objects forbidden by law, whether it be by statute, or by express rule of the common law, or by the general policy of the law."

It is true that contracts made for the purpose of violating the law cannot be enforced; and we have good illustrations of this in many of the cases cited in this book, where commission merchants were employed to make unlawful wagers in the form of purchases and sales, and where money was loaned for the purpose of paying losses made under such un-

[1] Vol. I, sec. 284.

lawful wagers or compounding or paying differences in unlawful stock-jobbing. But in these, and similar cases, parol evidence was not offered to show that the contracts sued upon were unlawful, or that the contracts themselves, or the intention of the parties to them were different from what their written terms implied; and the rule of evidence which we are now considering was not violated by showing that the losses paid, money loaned, and services performed had been, or was to be, applied to purposes which the law prohibited.

It appears, then, that to allow the introduction of testimony to show that a contract of sale in writing is nullified by a parol agreement that the written contract is not to be enforced, and is really no contract of sale at all, violates one of the oldest and best established rules of evidence.

It is submitted that to do this is altogether unnecessary. The object desired by the courts would be much better accomplished by a strict enforcement of the rule, and compelling parties who reduce their contracts to writing, to perform them, rather than to relieve them from their obligations by allowing them to show an understanding and intention contrary to their terms.

It is not enough, nor is it true, to say that if a written contract can be made the cover of a wager, that there would be no means of preventing gambling. In the first place, if gamblers knew the contracts they made would be enforced against them, they would never make such covering contracts, for it would be contrary to the object which they had in view; and the result would be that gambling would necessarily

take the form of pure wagers or bets on the market price of the article wagered upon. It is incorrect to say that gamblers assume the cover of legitimate and lawful trade. They never really do this for the purpose of avoiding the obligations which they thereby in form assume. They operate in forms of legitimate trade simply as a matter of convenience. Let them understand that a written contract must be enforced, and they will never make such a contract; and thus we would have a cure of the evil in part by the enforcement of the rule of evidence which we are now considering.

Again, the violation of the rule is not necessary, because such contracts are extremely rare. Wagers are very seldom reduced to writing, and a real wagering contract in form of a written sale is as rare in this country as the court in Thacker *v.* Hardy[1] said time bargains were in London. In fact, it can be said to the credit of the exchanges in this country, that such contracts on their floors are almost if not quite unknown.

If people wish to gamble on the price of any commodity, they do it in bucket shops. There the form assumed is not that of purchase or sale, but that of the employment of a broker or commission merchant to make the sales for an assumed principal;[2] or they make contracts of sale directly with one another by oral agreement; or they make a bargain with a member of an exchange, as appears in the case of Byers *v.* Beattie,[3] where the mutual promises of the parties were to

[1] 27 W. R. 158; s. c. L. R. 4 Q. B. D. 685.

[2] Bryant *v.* Western Union Tel. Co. 17 Fed. Rep. 825.

[3] 16 Weekly Reporter, 279. See Chap. V, Rule 14.

pay differences to each other. It is extremely rare that any of these contracts are in writing. And lastly, it is not necessary, because if the evil is really so very great, it could be reached by legislation. It is no part of the duty or province of the court to apply the law to cases to suit their own notions of propriety. They are to apply it as they find it. Cotton, L. J., in Thacker *v.* Hardy,[1] who certainly was no admirer of the methods pursued on the London stock exchange, said: "We ought to decide this case, as all others, according to what we consider to be the principle, and without reference to what the consequences of our decision may be; and I am not sure that a decision like this, when we find ourselves compelled to hold that the persons who had employed a broker under such circumstances as the present, are liable in the event of this case, is not more likely to check these transactions on the stock exchange than if we had decided otherwise."

[1] 27 W. R. 158; s. c. L. R. 4 Q. B. D. 685.

CHAPTER III.

FACTS AND CIRCUMSTANCES WHICH HAVE BEEN CONSIDERED BY THE COURTS AS INDICATING AN INTENTION TO WAGER.

It is proposed in this chapter to consider what facts and circumstances tend to show that contracts for future delivery, lawful on their face, are in fact wagers. At the outset it must be confessed that the cases are unsatisfactory and contradictory. This is due partly to the fact that they were improperly prepared, and badly presented; partly that the courts and counsel did not have accurate knowledge of the real methods of doing business on the exchanges; but more especially because a proper discrimination between speculation and gambling was not made.

Distinction between speculation and gambling.—As introductory to the consideration of this subject let us examine the decisions which refer to the distinction between speculation and gambling. In Clarke *v.* Foss,[1] the court, in speaking of contracts for future delivery, where the seller did not possess the articles sold, nor have any means of getting them, except by purchasing them in the market, said: "Such contracts, though entered into for pure purposes of speculation, however censurable, when made by those engaged in ordinary mercantile pursuits, and who have creditors depending for the payment of their just claims

[1] 7 Biss. 540.

upon their prudent management in business, are nevertheless not prohibited by law. In Porter *v.* Viets,[1] it was said: "People might differ about the propriety of making such a contract by one who did not know certainly where he was to acquire the property, but, having made it, the courts will compel him to abide by it. * * * Whatever may be the judgment of discreet men as to the propriety of such purely speculative transactions as are disclosed by this record, undertaken by men in mercantile pursuits, I am unable to see, on general principles, any objection to them in point of law. The law does not undertake to prevent speculation. It does not undertake the Quixotic task of nicely governing men in all relations of life, and compelling them to do, under all circumstances, what is prudent and reasonable. The truth is, men are speculative creatures as certainly as they are eating and sleeping ones. And although it is undoubtedly true that much harm comes to the community from over speculation, it is more than doubtful, if the world would be better off without speculators; or if it would be that the law can do much in the way of abolishing them. It is only with the more manifest abuses of the privileges of citizens in their dealings with one another, and when the evil touches and affects the public welfare, that the law assumes to interfere. In the main, commercial transactions must be left to be regulated by the higher and more inexorable laws which govern the trading world. If the transactions disclosed by this case are illegal, then, undoubtedly, a great part of the banking and clearing-house transactions in our great commercial centers are illegal also. I am per-

[1] 1 Biss. 177.

suaded that to hold them so would be trenching too severely upon the business of the commercial world, without any corresponding benefit to be expected from it. It might be a difficult task to lay down any single rule or draw a straight line which should define or divide all merely speculative from all pure gambling transactions, for it must be admitted that the same prime element of risk is common to both."

In Smith *v.* Bouvier,[1] which was an action arising out of a short transaction in stocks, the court said: "There is no objection to the transaction, if it be a real transaction, and a real delivery of the stocks is contemplated and effected, or that it was a speculation. It is the business of all people who engage in trade to speculate; all trade is based upon speculation, and no contracts are obnoxious to legal objection merely because they are speculations."

In Kirkpatrick *v.* Bonsall,[2] which was an action brought for the non-performance of a pure option contract in oil, the court said: "We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words they think of and weigh, that is speculate upon, the probabilities of the coming market, and act upon this lookout into the future in their business transactions; in this they often exhibit high mental grasp, and great knowledge of business, and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions, and

[1] 70 Pa. St. 325.
[2] 72 Pa. St. 155.

buy or sell in a *bona fide* way." This case has been frequently quoted in subsequent cases.[1]

In Kent *v.* Miltenberger,[2] the court said: "The law puts no restraint upon trade which renders it unlawful for a man to buy or sell commodities in which he does not generally deal, if he thinks he can catch a favorable turn of the market and make money by so doing. What one man is at liberty to do in this respect, another man is equally at liberty to do. * * * The circumstance which renders these contracts unlawful is a contemporaneous agreement that they shall not be executed by a delivery, but only by a settlement of differences. Unless there is such an agreement it is idle to talk about the gambling intent, or wagering intent, or bets upon the future state of the market, because this is a mere play upon words. Every intent to speculate becomes in the opinion of some a gambling intent, and every mercantile venture involves in the same view a bet upon the state of the market. The law distinctly defines the characteristic of a gambling contract when it takes the outward form of buying and selling for future delivery. To that definition we must adhere. The rule which we are asked to assent to by the learned counsel for the defendant in this case remits the whole subject to the loose discussion of juries, and puts it entirely at sea."

In Hatch *v.* Douglas,[3] which was an action brought by a broker and member of the New York Stock Exchange for losses paid upon ordinary speculations in stocks upon margins, the court said: "Contracts of

[1] *In re* Green, 1 Biss. 338; Gregory *v.* Wendell, 39 Mich. 337.

[2] 13 Mo. App. 503.

[3] 48 Conn. 116.

this nature however are distinguishable from speculating contracts. A man may legitimately buy goods or stocks intending to sell in a short time and take advantage of an advance in the price if there is one. In such a case he takes the risk of a decline, but that does not make it a gambling contract. And he may purchase goods at a fixed price to be delivered at a future day, if the parties intend an actual delivery and acceptance. * * * Now there are in the transactions between these parties some of the elements which are usually found in a gaming contract. For instance, it is pretty evident that the parties did not contemplate that the stock should be actually transferred to the defendant; but he would have been satisfied with the receipt of the difference between the price paid and the price received, less interest and commission if the price advanced, and expected to pay that difference if the price declined. To that extent it was a contract for the payment of differences. But it was more than that. The defendant through his agents, the plaintiffs, actually purchased the stock, and there was an actual delivery—not to the principal, but to the agents for the principal. The plaintiffs advanced the money and held the stock in their hands as security. The plaintiffs were ready at any time to transfer the stock to the defendant on payment of the purchase-money. The import of the finding is, and we must so regard it, that it was an actual and *bona fide* employment of the plaintiffs to purchase stocks, and not a mere formal employment, designed to cover a betting operation. It does not appear that the plaintiffs assumed any risk. They were entitled to their commission and interest on their advancements whether the stocks went up or

down. The most that can be said of them is, that they knew that the defendant was speculating, and they advanced him money for that purpose. But that was neither illegal nor immoral. The circumstances relied upon to prove the illegality of this contract are consistent with the claim that it was a legitimate business transaction. It is probably true that dealing in stocks on 'margin,' as it is called, is fraught with much evil. It encourages speculation, and induces many to engage in it, who would not otherwise have the requisite means. In that way many people and business generally suffer more or less, but it is an evil that existing laws do not reach. No case has been cited which declares such a contract illegal. If we should so hold it would be difficult, if not impossible, to draw the line between legal and illegal transactions. We are of the opinion that there are not in the case before us sufficient reasons for declaring the contract illegal."

In Flagg *v.* Baldwin,[1] the court said: "The line is to be drawn between what is legitimate speculation and what is unlawful wagering. When property is actually bought, whether with money or with credit, the purchaser and owner may lawfully hold it for a future rise, and risk a future fall. With such transactions the law does not pretend to interfere. They are within the line of lawful speculation. But when, either without any disguise or under a guise which simulates such legitimate enterprises, the real transaction is a mere dealing in the difference between prices, *i. e.*, in the payment of future profits or future losses, as the event may be, then, in my judgment, the line which separates lawful speculation from illegal

[1] 38 N. J. Eq. 219.

wagering is crossed, and the contract, under our law, becomes unlawful, and the securities for it void. This proposition is sustained by all the cases, without an exception, that I can discover. The only disagreement relates to the application of the doctrine."

OPTIONS AS TO THE TIME OF DELIVERY.—PURE OPTIONS.

A distinction is to be made between what are commonly called options, where the only thing optional is as to the time of delivery within certain fixed periods, and what has been called in the previous chapter, "pure options;" the latter being a privilege which the owner of the option has of delivering or requiring delivery or not as he sees fit. The former are universally regarded as legal. In Whitesides *v.* Hunt,[1] the court said: "If the *bona fide* intention of the seller is to deliver, and the buyer to buy, and the option consists merely in the time of delivery within a given time, the contract is valid." And in Logan *v.* Musick,[2] where it was claimed that such a contract was within the statute of that State prohibiting the sale of options, the court said: "A contract for the sale of grain for future delivery, whilst it may give the purchaser an option to select a day within a limited time on which he may receive the grain, does not constitute such an option to buy at a future time as is prohibited by the statute. * * * It is true, the defendant had an option, under the contract, to select a day within a limited time on which he would receive

[1] 97 Ind. 191. [2] 81 Ill. 415.

the grain; but such an option does not fall within the statute, for the reason that it does not render the sale optional." These contracts are very common on the produce and cotton exchanges, and frequently occur on the stock exchanges. The contracts are usually at the seller's option, but may be and frequently are at the buyer's option. On the New York Stock Exchange the time within which these optional deliveries may be made is limited to sixty days. On the other exchanges they are usually within any given month in the year. For instance, to buy or sell "a March" on the cotton exchange, means that the delivery is to take place at any time within the month of March. To buy or sell a July "option" upon the produce exchange means that the article bought or sold shall be delivered during the month of July. In all these cases the party having the option must make or require delivery upon the last day of the time limited, unless he has exercised his option to do so before that time. This form of contract has been repeatedly held to be legal.[1]

In Pixley *v.* Boynton,[2] the court said: "The purchase of grain at a certain price per bushel, made in

[1] Union Nat. Bank of Chicago *v.* Carr, 15 Fed. Rep. 238; Beveridge *v.* Hewitt, 8 Bradw. 467; Webster *v.* Sturges, 7 Bradw. 56; Gilbert *v.* Gauger, 8 Biss. 214; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Jackson *v.* Foote, 12 Fed. Rep. 37; Wolcott *v.* Heath, 78 Ill. 433; Sawyer *v.* Taggart, 14 Bush, 727; Cole *v.* Milmine, 88 Ill. 349; Porter *v.* Viets, 1 Biss. 177; Clarke *v.* Foss, 7 Biss. 540; Gregory *v.* Wattowa, 58 Iowa, 711; Melchert *v.* Am. Union Tel. Co., 11 Fed. Rep. 193; *Ex parte* Young, 6 Biss. 53; Kent *v.* Miltenberger, 13 Mo. App. 503; Colderwood *v.* McCrea, 11 Bradw. 543; Shaw *v.* Clarke, 49 Mich. 384; Williams *v.* Tiedman, 6 Mo. App. 269; Swift *v.* Powell, 44 Geo. 123; Cobb *v.* Prell, 15 Fed. Rep. 774; Frost *v.* Clarkson, 7 Cowen, 24.

[2] 79 Ill. 351.

good faith, to be delivered in the next month, giving the seller until the last day of the month, at his option, in which to deliver, is not an illegal or gambling contract, and the purchaser will be entitled to its benefit, no matter what may have been the secret intention of the seller. * * * Under such a contract, as we understand the evidence, all the option the seller has is the privilege to deliver the grain at any time before the maturity of the contract. This is nothing more than a time contract, which is regarded on the board of trade and elsewhere as a legitimate and regular contract. Time contracts in relation to grain, as well as other commodities, are of daily occurrence, and must necessarily be in commercial transactions."

The second class of options—"pure options"—are of a very different character. In these, whether delivery takes place or not, depends upon the will of the party entitled to demand or make it. He may require or make it, or he may not, and he pays a certain sum for that privilege. If he does not exercise it within the time limited, his right to do so is gone and he loses the price he pays. Whether or not such contracts are wagers will depend, like all contracts for future delivery, upon the question whether the contracts are designed as mere covers for wagers, or whether they are intended as *bona fide* contracts. It has sometimes been said that, like all other contracts for future delivery, it will depend upon whether the parties thereto intended a delivery to be made. This is very incorrect and furnishes an inadequate test; because it is perfectly apparent that an option to demand or make delivery is inconsistent with an intention that delivery should in any event be made. The fact that these pure op-

tions have been sustained by the courts show that the true test, whether a contract is a wager or not, is never whether the parties intended actual delivery or not, but is, whether they intended the contract actually made to be a cover for a wager or a *bona fide* contract. If the good faith of a transaction is to be tested by the intention as to delivery, then the question should be, could delivery in any event be compelled by either party?[1] If it could, then the contract is not a wager. "Pure options" are never made in the New York Produce and Cotton Exchanges, and would not be enforced under their laws. In England and in this country they are recognized by the stock exchanges. In England, however, there are no adjudications upon the question whether they are legal or not. In this country there are some decisions sustaining their validity, and there are some statutes, and other decisions against them. These pure option contracts have been described on page 27, and are quite common in Wall street.

In Tyler *v.* Barrows,[2] the defendants made an executory contract by which they agreed to sell and deliver to the plaintiff's assignors at a specified price a certain number of barrels of petroleum oil by instalments, consisting of a certain number each, at intervals of fifteen days, until the whole was delivered, provided the buyers gave notice at such time of their intention to receive the same. The buyers agreed to pay that price for so many of said instalments as they should notify the defendants of their intention to take, and should receive and pay $1,000

[1] Hentz *v.* Jewell, 20 Fed. Rep. 592.

[2] 6 Robt. 104.

for each of such instalments which they should so fail to notify the defendants of their intention to take. It was held that, "although it did not appear that the defendants owned any oil at the date of the contract, such contract was not necessarily a wagering contract; because the buyers might elect to take all the oil agreed to be delivered, and the sum agreed to be paid for the option of taking or refusing the oil was not necessarily a sum staked upon any event; and unless such contract was incapable of any other construction, or there was extrinsic evidence to show that the parties intended to lay a wager by means of it, it was not objectionable."

In Kirkpatrick *v.* Bonsall,[1] the plaintiff and defendant made the following contract: "For and in consideration of the sum of $1,000 to us in hand paid by Sterling Bonsall, Esq., the receipt of which is hereby acknowledged, we hereby bind and obligate ourselves to deliver to said Sterling Bonsall, or his assigns, should he or they call upon us to do so at any time during the first six months of 1871, five thousand barrels of good, green, merchantable, crude petroleum. * * * If said oil is called for, this becomes a contract, ten days' notice shall be given, and said Sterling Bonsall, or his assigns, hereby agree to receive and pay for same, cash on delivery, at the rate of ten and a half cents per gallon on lots as gauged and delivered. One-half per cent. brokerage whether oil is delivered or not." Agnew, J., said: "We cannot pronounce this agreement a gambling contract on the face of the writing. A bargain for an option,

[1] 72 Pa. St. 155.

such as it presents, may be legitimate and for a proper business object. We can imagine such cases."

Another instance has been supposed where these contracts would be valid and in the regular line of business. "Let us suppose a person who is possessed of certain securities to be desirous of selling if he could get a bid, say one per cent. higher than the present price, and to be at the same time desirous of doubling his holding if he could buy at a price one per cent. lower. If he gives his instructions in this form to his broker, it may well happen that the price does not fluctuate sufficiently to make it possible to carry out either transaction. But the same practical result may be attained with certainty by the owner of the securities taking a one per cent. price for the put and call of them, for the money thus received would be, as it were, a reduction of one per cent. in the purchase price if the security is put upon him, and would equally, as it were, go to increase the selling price if it is called from him. There is, of course, this difference, that if the security is at precisely the same price on the option day as on the day the bargain was made, it may happen that the security is neither put nor called, and in that case the owner will have secured his one per cent. without further liability, and be in a position to repeat the process. Under such circumstances the option could not be said to be void as a wager."[1]

In the case of Chicago & G. E. R. R. Co. *v.* Dane[2] the defendant by letter offered to receive from the

[1] Laws and Customs of Stock Exchange, by Melsheimer & Laurence (London, 1879), 24.

[2] 43 N. Y. 240.

plaintiff, and transport from New York to Chicago, railroad iron not to exceed a certain number of tons at a specified rate per ton. The plaintiff merely assented to the proposal, but did not agree to deliver the iron for transportation. Grover, J., remarked that "this amounted to nothing more than the acceptance of an option by the plaintiff for transportation of such quantity of iron by the defendant as it chose; and had there been a consideration given to the defendant for such an option, the defendant would have been bound to transport for the plaintiff such iron as it required within the time and quantity specified, the plaintiff having its election not to require the transportation of any."

In Bigelow *v.* Benedict[1] an action was brought on the following contract:

"ATTICA, January 23d, 1865.

"Know all men by these presents, that I, Charles B. Benedict, for and in consideration of the sum of two hundred and fifty dollars good and lawful money of the United States, to me in hand paid, the receipt of which is hereby acknowledged, do agree to receive from M. C. Bigelow, at any time within six months from date he may choose to deliver the same, two thousand and five hundred dollars in gold coin of the United States, for which I agree to pay the said Bigelow ninety-five per cent. premium on the dollar, at the rate of one hundred and ninety-five dollars in good current funds for each and every one hundred of coin. The said Bigelow does not contract to deliver the coin, but pays the two hundred and fifty dollars for the privilege of delivering or not, at his option.

C. B. BENEDICT."

[1] 70 N. Y. 202. See, also, Disborough *v.* Neilson, 3 Jo. Ca. 81; Stanton *v.* Small, 3 Sandf. 230; Brown *v.* Hall, 5 Lau. 180.

It was claimed in defense that this contract was a wager and therefore void. Andrews, J., in delivering the opinion, said: "Mercantile contracts of this character are not infrequent, and they are consistent with a *bona fide* intention on the part of both parties to perform them. The vendor of goods may expect to produce or acquire them in time for a future delivery, and while wishing to make a market for them, is unwilling to enter into an absolute obligation to deliver, and therefore bargains for an option which, while it relieves him from liability, assures him of a sale, in case he is able to deliver; and the purchaser may in the same way guard himself against loss beyond the consideration paid for the option, in case of his inability to take the goods. There is no inherent vice in such a contract. * * * If such a contract relates to a marketable commodity the purchaser risks the chance of depreciation in market value between the execution of the contract and the time of the delivery, and the vendor loses the opportunity of selling them at a higher price if the market advances, but this hazard is in no sense a wager, if the transaction is *bona fide*, and it will be presumed to be so until the contrary appears. The form of a contract of sale may be resorted to as a mere cover for betting on the future price of the commodity agreed to be sold, and if this is the real meaning of the transaction, and no actual sale or purchase is intended, the contract is illegal, and will not be enforced. But the illegality is a matter of defense, and must be established by proof, and found by the jury."

In Story *v.* Solomon,[1] the action was brought upon the following contract:

"New York, May 15th, 1875.

"For value received, the bearer may call on the undersigned for one hundred (100) shares of the capital stock of the Western Union Telegraph Company, at seventy-seven and a half (77½) per cent. any time in thirty (30) days from date. Or the bearer may, at his option, deliver the same to the undersigned at seventy-seven and one-half (77½) per cent. any time within the period named, one day's notice required. All dividends or extra dividends declared during the time are to go with the stock in either case, and this instrument is to be surrendered upon the stock being either called or delivered.

S. N. Solomon."

Before the expiration of the thirty days the defendant suspended payment, the parties came to a settlement, and endorsed on the contract, "Settled at market 72¾," which was the price of the stock on the day of settlement. The difference between that price and the contract price was thus fixed as the sum which the plaintiff was entitled to recover, if he was entitled to recover anything. The defense relied upon was that the contract was a violation of the New York statute against gaming, and therefore illegal and void. The court said: "There was no parol proof that the parties intended by this contract a wager or bet, and the question must be determined by the terms of the contract itself. This contract purports to be based upon a valuable consid-

[1] 71 N. Y. 420.

eration. The plaintiff paid for the options given him. One may pay for an option to take at a future day, at a certain price, a farm, or any article of personal property. There is always uncertainty as to what the property will be worth at the day named, and if it should then be worth less than the price named, he will not take it. In all this there is not necessarily a bet or wager. It is an ordinary business transaction. And the case would not be altered if, instead of paying for an option to buy, he pays for an option to sell at a future day. Most contracts for the purchase or sale of merchandise at a future day are made with the view to the market price on the day of performance. There is always an element of speculation and uncertainty as to that, and yet it has never been supposed that there is any betting by such contracts. Here the option to buy and sell was put in the same contract. On the face of the contract the plaintiff provided for the contingency that on that day he might desire to purchase the stock, or he might desire to sell it, and in either case there would have to be a delivery of the stock or payment of damages in lieu thereof. We should not infer an illegal intent unless obliged to. Such a transaction, unless intended as a mere cover for a bet or wager on the future price of the stock, is legitimate and condemned by no statute; and that it was so intended was not proved. If it had been shown that neither party intended to deliver or accept the shares, but merely to pay differences, according to the rise or fall of the market, the contract would have been illegal."

In Harris *v.* Tumbridge,[1] the action was brought

[1] 83 N. Y. 92.

against a stock-broker to recover damages for alleged unauthorized acts, negligence, and want of skill as agent of plaintiff in a stock transaction. "The plaintiff bought through the agency of the defendant a stock option or privilege, known in the language of stock-brokers as a 'straddle.' The word, if not elegant, is at least expressive. It means the double privilege of a put and a call; and secures to the holder the right to demand of the seller at a certain price within a certain time a number of shares of specified stock, or to require him to take at the same price and within the same time the same shares of stock. The continuance of the option is fixed by the agreement, and in this case was for sixty days. The value of a straddle, it is proven, depends upon the fluctuations of the stocks selected. It was argued that this was a gambling transaction, and as such prohibited by statute." The court said: "It may have been, but there is no proof that it was, and no such defense was pleaded. The contract was not of necessity a wager contract. That it might have been does not at all dispense with the necessity of proving that it was."

In the case of Yerkes *v.* Solomon,[1] the defendant made and for valuable consideration delivered to the plaintiff three contracts. One of them was a "put" for five hundred shares of the Lake Shore Railroad Company, the second a "call" for two hundred shares of the stock of the Pacific Mail Steamship Company, and the third a "call" for five hundred shares of the Lake Shore Railroad Company. While these contracts were running the defendant became insolvent, and on being notified by the plaintiff that he intended to deliver to him the stock,

[1] 11 Hun, 471.

said he had failed, and that he could not take them. It was then agreed between them that the contracts be settled on the market price of that day, and a memorandum to this effect was endorsed on the contracts, and signed by the defendant. A few days after the plaintiff presented an account made up in accordance with this statement, and defendant said it was right and promised to pay it. It was claimed that these contracts were void under the statute against betting and gaming, and that the defendant had the right to show that they were made with the intention to settle the differences, and not to deliver or accept the stock. The plaintiff was asked, if at the time the contracts were made he intended to tender or call for the stocks, or merely to settle the differences? This testimony was excluded, and upon appeal it was held to have been error. This case is of importance here only as showing acquiescence in the point decided in the cases of Bigelow *v.* Benedict,[1] and Story *v.* Solomon;[2] and as also showing that pure options are liable to be shown to be void as wagers like any other contract for future delivery, and in that way only.

In some States, however, contracts of this character, where the thing bought or sold is the mere privilege of making or requiring a delivery, have been held to be obnoxious, and contrary to public policy.

In the case of *Ex parte* Young,[3] sometimes called Chandler's case, a statement of which is given in another place,[4] the court, after finding as a matter of fact that neither of the parties to the several put contracts intended an actual delivery of the oats, but that set-

[1] 70 N. Y. 202.
[2] 71 N. Y. 420.
[3] 6 Biss. 53
[4] *Ante*, page 36.

tlements should be made upon the differences in the market price, said: "I do not intend to be understood as holding that every option contract for the delivery of grain or stock, or that every 'put' is necessarily void, but only that all these contracts, in the light of the testimony before the court, were in their essential features gambling contracts. The parties when they made them did not intend to deliver the grain, but only at the utmost to settle the differences. They knew they could not obtain the grain to deliver if Chandler sustained his 'corner,' and their action in buying a 'put' was virtually a bet on their part that he could not accomplish what they all knew he was endeavoring to do; that is, to keep up the price through June to his own figures, and virtually a bet on his part that he could do so. It is shown in the proof, and urged in the argument, that the 'put' in itself is a very harmless contract,—that dealers frequently resort to it as a method of insuring prices. It is answer enough to this to say that the proof fails to show that such was the object of any of these claimants. * * * It is perhaps possible to imagine a dealer with a stock of grain on hand which he wishes to hold for an advance, who may take a privilege of this kind to insure himself against a decline while waiting for an advance. But the very act of offering to sell a 'put,' either implies that the seller has control of the market so that he expects to make his own price, or else it is a mere reckless assertion of the seller's opinion that the price will be maintained, either of which partakes of the character of a bet." The last remark of the learned judge seems to be inconsistent with what he had previously said, but taken as a whole he seems to hold

that a contract of this character is presumed to be a wager, but may be shown to be for a lawful purpose. This is not logical, nor in keeping with principles thoroughly established.

In Illinois pure option contracts have been held to be void at common law,[1] and by statute are made criminal.[2]

WHERE THE SELLER DID NOT AT THE TIME OF SALE OWN OR HAVE POSSESSION OF THE ARTICLES SOLD.

These are sometimes called time contracts. In Lorymer *v.* Smith,[3] Lord Tenterden remarked: "That if a man should bargain to deliver corn not then in his possession, and rely upon making a future purchase in time to fulfill his contract, such a mode of dealing ought not to be encouraged;" and in the subsequent case of Bryan *v.* Lewis,[4] the same learned judge said: "I have always thought, and shall continue to think until I am told by the House of Lords that I am wrong, that if a man sells goods to be delivered on a future day, and neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by assignment, but means to go into the market and buy the goods which he has contracted to deliver, he cannot maintain an action on such contract. Such a contract amounts, on the part of the vendor, to a wager on the price of the

[1] Webster *v.* Sturges, 7 Bradw. 56; Pickering *v.* Cease, 79 Ill. 328; Tenney *v.* Foote, 4 Bradw. 594; Gilbert *v.* Gauger, 8 Biss. 214; Walcott *v.* Heath, 78 Ill. 433; Lyon *v.* Culbertson, 83 Ill. 33.

[2] See page 21.

[3] 1 B. & C. 1.

[4] Ry. & Mo. 386.

commodity, and is attended with the most mischievous consequences." In the case of Wells *v.* Porter,[1] Bosanquet, J., expressed doubts as to the soundness of this doctrine; and in Hibblewhite *v.* McMorine,[2] it was overruled. The last action was brought for breach of contract for failure on the part of the defendant to accept and pay for fifty shares of the stock of the Brighton Railway Company, which the defendant had agreed, on the tenth day of September, 1838, to accept and pay for on the first day of March, 1839, or at any intermediate date that defendant might require them. The defense was made that, inasmuch as the plaintiff at the time he made the contract was not possessed of the shares or entitled to them, nor had entered into any contract for the purchase of them, or had any reasonable expectation of becoming possessed nor entitled to them within the time provided by the agreement, the plaintiff could not maintain his action. There was a demurrer to this plea, and it was sustained by the unanimous opinion of the court. Parke, B., said: "I have always entertained considerable doubt and suspicion as to the correctness of Lord Tenterden's doctrine in Bryan *v.* Lewis; it excited a good deal of surprise in my mind at the time, and when examined I think it is untenable. I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods, of which he has not possession at the time of the bargain, and had no reasonable expectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties are not cognizant of the fact that the goods are not in the vendor's possession; and even if it were a

[1] 3 Scott, 141.

[2] 5 M. & W. 462.

wager, it is not illegal, because it has no necessary tendency to injure third parties." This decision settled the law in England, and has since been followed in the cases of Mortimer *v.* McCallen,[1] and Ashton *v.* Dakin,[2] and has been universally followed in this country.[3]

In Stanton *v.* Small,[4] it was decided that "a contract for the sale of goods, to be delivered at a future time, is not invalidated by the circumstances, that, at the time of the contract, the vendor neither had the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them at the time appointed for delivery, otherwise than by purchasing them after making the contract."

[1] 6 M. & W. 58.

[2] 4 N. & H. 869; s. c. 32 Law Times, 300.

[3] Sawyer *v.* Taggart, 14 Bush, 727: Warren *v.* Hewitt, 45 Ga. 501; Rumsey *v.* Berry, 65 Me. 570; Gregory *v.* Wendell, 39 Mich. 337; Webster *v.* Sturges, 7 Bradw. 56; Beveridge *v.* Hewitt, 3 Bradw. 467; Whitesides *v.* Hunt, 97 Md. 191; McIlvane *v.* Egerton, 2 Robt. 432; Stanton *v.* Small, 3 Sandf. 230; Pickering *v.* Cease, 79 Ill. 328; Logan *v.* Musick, 81 Ill. 415; Tyler *v.* Barrows, 6 Robt. 104; Irwin *v.* Williar, 110 U. S. 499; Clarke *v.* Foss, 7 Biss. 540; Kent *v.* Miltenberger, 13 Mo. App. 503; Bartlett *v.* Smith, 13 Fed. Rep. 263; Smith *v.* Bouvier, 70 Pa. St. 325; Hatch *v.* Douglas, 48 Conn. 116; Walcott *v.* Heath, 78 Ill. 433; Marshall v. Thurston, 3 Lea, 741; Melchert *v.* Am. U. Tel. Co. 11 Fed. Rep. 193; Brown *v.* Speyers, 20 Grat. 296; Noyes *v.* Spalding. 27 Vt. 421; Williams *v.* Tiedman, 6 Mo. App. 269; Cole *v.* Milmine, 88 Ill. 349; Colderwood *v.* McCrea, 11 Bradw. 543; Whitehead *v.* Root, 2 Met. 587; Bruas' Appeal, 55 Pa. St. 294; Brown *v.* Hall, 5 Lans. 177; Pixley *v.* Boynton, 79 Ill. 351; Disborough *v.* Nelson, 3 Johns. Ca. 81; Cassard *v.* Hinman, 1 Bosw. 207; Chapman *v.* Campbell, 13 Grat. 105; Kirkpatrick *v.* Bonsall, 72 Pa. St. 155; Corbett *v.* Underwood, 83 Ill. 324; Yerkes *v.* Salomon, 11 Hun, 471; Porter *v.* Viets, 1 Biss 177; Sanborn *v.* Benedict, 78 Ill. 309; Currie *v.* White, 45 N. Y. 822; Bigelow *v.* Benedict, 70 N. Y. 202.

[4] 3 Sandf. 230.

In Sawyer *v.* Taggart,[1] the court said: "An effort was made to prove—aud, for the purposes of this case, we assume it was successful—that none of the persons with whom Sawyer, Wallace & Co. made contracts for purchase, had the goods contracted for on hand at the time of entering into the contracts, and that they had no reasonable expectation of acquiring them except by purchasing in the market. But that fact did not render the contracts unenforceable, much less vicious."

In Gregory *v.* Wendell,[2] the court said: "The mercantile business of the present day could no longer be successfully carried on, if merchants and dealers were unable to purchase or sell that which, as to them, has no actual or potential existence. A dealer has a clear right to sell and agree to deliver at some future time that which he then has not, but expects to go into the market and buy. And it is equally clear that parties may mutually agree that there need be no present delivery of the goods, but that such delivery may take place at some future time."

In Whitesides *v.* Hunt,[3] it was said: "It was formerly held that where the vendor neither had the goods, nor entertained any contract to buy them, at the time of the sale, nor had any reasonable expectation of receiving them by consignment, but intended to go into the market and buy the article he intended to deliver, no action could be maintained on such contract. But that rule has been changed by the later authorities, and there have been numerous decisions,

[1] 14 Bush, 727.
[2] 39 Mich. 337.
[3] 97 Ind. 191.

particularly in this country, holding that the vendor may contract for the sale of an article not in his possession, and this doctrine seems to be entirely in accordance with the rules of public policy."

And in Rumsey *v.* Berry,[1] it was said, the fact that the seller had no wheat to sell at the time he made the contract, was immaterial, and that consequently the knowledge of it was equally so.

The case of Melchert *v.* American Union Telegraph Co.[2] seems to be in conflict with this rule. The action was brought to recover damages against the defendant for negligence in forwarding a message, whereby the plaintiff sustained damage in his speculation in rye through a factor in Chicago. It was held that, even admitting the negligence of the Telegraph Co., the plaintiff could not recover, because the transactions in which the plaintiff was engaged through his factor were wagers, and not *bona fide* sales and purchases of rye. The rye was purchased by the Chicago factor from A. M. Wright & Co. Among the reasons which induced the court to come to its conclusion, was the fact that there was no evidence of any of the parties having the rye which, it was said, was sold. The court said: "In the case at bar there is no proof that the plaintiff or his agent, the factor, had in fact any rye to deliver, or any warehouse receipts representing the rye in store. If this fact existed, it could have easily been proved, and would doubtless have been established by some competent evidence. There is no evidence that Wright & Co. had a pound of rye in store with which to fulfill their contract for the sale of the 15,000 bushels to the plaintiff's factor. Wright & Co., as far as

[1] 65 Me. 570.

[2] 11 Fed. Rep. 193.

it appears, relied for the fulfillment of the contract upon receiving 10,000 bushels of rye from Gerstenberg, and 5,000 bushels from other parties, who, so far as we know, had neither rye nor warehouse receipts to deliver. Why were not some of these parties called to show that they held rye or warehouse receipts for delivery in fulfillment of their contract? The inference is that they had none, and that they all depended upon paying differences to adjust their contracts." A complete answer to the question of the learned judge is, that it was not necessary to show that any of the parties held rye or warehouse receipts, because, as is shown by an overwhelming number of authorities, each one of them had a perfect right to go into the market at the time mentioned for delivery in the contracts and buy the rye; and, moreover, each of them may have intended, and had a perfect right to have intended, to transfer their rights under their respective contracts to others who could make delivery. Admitting, then, if it had been affirmatively shown that neither of these parties had the possession of the rye or warehouse receipts for the same, it did not show nor tend to show that the contract of sale made by the plaintiff's factor to A. M. Wright & Co. was a wager upon the market price of rye; and even if this fact were pertinent for that purpose, to presume from a want of evidence upon this point that the parties did not have the rye or warehouse receipts, violates the well-known principle of law, which presumes a contract to be valid until the contrary is shown.

The following article of Francis Wharton, Esq., appearing as a note to the case of Melchert *v.* Am.

Union Tel. Co.,[1] is interesting in this connection: "The question of the legality of sales by option, which is discussed with so much ability by Judge Love in the foregoing case, is dependent in part on local legislation, in part on judicial precedent, in part on the special tendency of the adjudicating court in respect to political economy. In the latter respect two conflicting tendencies exist:

"1. That of '*laissez faire*,' accepted in the main by Adam Smith and by J. S. Miller, and forming a part of the political system of English Liberals, and of doctrinaire Democrats in this country. Business should be left free, so it is argued, to adjust itself. For government to interfere in making contracts (unless for the single purpose of determining the proof on which they are to be sustained, as is the case with the Statute of Frauds) creates a greater evil than the evil it is intended to cure. This is eminently the case, so it is insisted, with 'corners' and 'options.' If all 'corners' are prohibited, either by legislation or by judicial decision, all retail business will be prohibited. There is no purchase for retailing into which the notion of 'cornering' does not enter. I buy for the purpose of profit, and there is a tacit understanding between myself and other retailers that there shall be a sufficient advance charged to enable all to make something by the transaction. In other words, we buy up all of a particular commodity, and we say to the consumer, 'you shall not get this except by paying a higher price than we paid for it.' Now this is 'cornering,' in so far as that by a tacit consent it precludes the consumer

[1] 11 Fed. Rep. 193.

from obtaining the goods in question unless he pays the premium to the retailer; and the manufacturer or wholesale dealer unites in this 'cornering' by refusing to sell to the consumer unless on retail price. The principle is the same as when particular parties unite to 'engross' or absorb that particular staple by buying up the whole of it in the market and then holding it for a rise. This, which is 'cornering' in a popular sense, no doubt may be used for extortionate purposes, yet it cannot be prohibited without at the same time prohibiting all retail trade. The evil cures itself far more effectually than it can be cured by the interference of the law. Supposing that a monopoly is obtained by mere voluntary absorption of a particular article by which great gains are got, this leads only to the starting of competitors in the same line; and for the law to interfere and say, 'you shall not monopolize,' is equivalent to saying, 'you shall not trade.' The same distinctions may be taken in respect to sales of things not at the time owned by the vendor. It is said that for me to agree to deliver next week at a fixed price a thing I do not own, is gambling. It may be so; but, if it be, then gambling infects so large a part of every-day life that if all that gambling thus infects be prohibited, business will be prohibited. My baker and butcher, for instance, engage to supply me with provisions each day for a month in advance, though these provisions are not now in their hands; and though they usually engage to supply at the market price, yet the cases are rare in which (*e. g.*, so much for a pound of butter or so much for a loaf of bread) are fixed in advance. All building contracts are based on this principle; the con-

tractor makes or loses as the materials he uses fall or rise in the market, or the weather is unpropitious or propitious. If things are let alone, all this corrects itself. Men will make their contracts more special, so as to guard against disasters, or they will obtain insurances collaterally against loss; and even if there are occasional disasters, it will be found that in the excitement of competition, and in the constant presence of risk, there is a stimulus, without which enterprise, caution, and sagacity would not effectually be called forth. That when things are let alone—in other words, when 'trade' is 'free'—things ultimately adjust themselves far better than could be done if the government interfered, is illustrated by the every-day operation by which a great city is fed. Here are 100,000 families, and each family has brought to its door the supply of milk, of bread, of meats, on which it relies. You station yourself—I borrow in this one of Archbishop Whatley's illustrations—on one of the avenues to a city as day is breaking, and you see approaching multitudinous wagons or boats laden with produce of all kinds. No law uttered by legislation or courts prescribes to each producer or pedler what he shall bring to the city and what he shall sell; the only law is the social law of supply and demand; but this works so perfectly that the milk from a thousand dairies is collected to-night to be distributed early to-morrow morning precisely where it is needed in the city. And so with the vegetables from a thousand truck farms, and the meat from hundreds of slaughter-houses. If government, through either legislature or court, should interfere, this delicate adaptation of supply for demand would be destroyed. It is only by letting competition

be unrestrained that supply is so adjusted to demand as to properly employ the producer and properly supply the consumer. It is only under the incitement of competition thus induced that the staples of trade are from day to day extended and machinery made more perfect. Such is the '*laissez faire*' theory of political economy, a theory of late years, since the triumph of free trade principles in England adopted by the English courts as well as by the British Parliament, and adopted also by the courts of several of our States.

"2. The conflicting schools to which I called attention, starts from an ethical or police basis. 'Certain business contracts,' it says, 'are immoral and must be prohibited;' and among immoral contracts are classed all contracts for the sale of things the vendor does not possess at the time, and which he does not expect to possess; the contract in such case only binding him to pay the difference in price in case the price of the article sold has risen at the time fixed, he being entitled to benefit by any fall of prices marked at the same period. This position is thus stated by Judge Love in the opinion above given. 'If it be not the *bona fide* intention of the parties that the property shall be in fact delivered in fulfillment of the contract of sale, but that the seller may, at his election, deliver or not deliver, and pay the difference, then the contract is void.' In Illinois this is prescribed by a statute quoted by Judge Love, and though that statute is in terms so broad as to cover contracts which are not in any sense gambling, it is restricted by the State judiciary to cases where the transaction is to be 'adjusted only upon differences.' As going to the

same point may be cited Lyon *v.* Culbertson, 83 Ill. 33, and other Illinois cases cited by me in the opening article in the Criminal Law Magazine for January, 1850. As the contract before us was an Illinois contract, it was governed by the Illinois law; and (supposing that the Illinois statute was not repugnant to the Federal Constitution) Judge Love had no alternative but to apply it as construed by the Illinois courts.[1] Whether such a statute conflicts with the clause in the Federal Constitution which provides that the State laws impairing the validity of contracts shall be inoperative, is an important question which has not yet been discussed; and it may be in view of this question that Judge Love, in the opinion before us, rests his conclusion, not merely on the statute, but on the general policy of the law. And there is no question that, irrespective of statute, it is settled that a contract to pay any rise on the price of a particular article, at a given future period, is void under the common law as gambling. It is not a contract for sale and delivery, for no delivery is contemplated. It is simply a bet as to what the market will be at a particular time. 'If prices are stationary, there will be nothing to pay. If prices rise, I pay you the rise. If they fall, you must pay me the fall.' Such a contract the courts will not enforce, as against the policy of the law."

In this country there have been several statutes against "short sales," some of which are still in force.[2]

[1] This statute is discussed by me in an article already referred to, published in the Criminal Law Mag. for Jan. 1882.

[2] See Chap. I.

MARGINS.

It is provided by the by-laws of the New York Stock Exchange, that "in any contract, either party may call, at any time during the continuance of the same, for a mutual deposit of ten per cent. And when the market price of the security shall change, so as to reduce the amount of said deposit either way below five per cent., either party may call for a deposit sufficient to restore the margin to ten per cent., and this may be repeated as often as the margin be so reduced."

In the New York Produce Exchange it is provided by the rules regulating the various departments of trade, that either party to a contract, prior to or upon signing the same, shall have the right to call an original margin of ten cents per bushel on wheat, rye, and barley, and five cents a bushel on corn and oats, and two dollars per tierce on lard, and one dollar per barrel on pork, etc.; and for a further margin from time to time to the extent of any variations in market values from the contract price, the margin to be deposited in a bank or trust company designated by the finance committee of the exchange. In the New York Cotton Exchange, the Chicago Board of Trade, and other exchanges throughout the country, similar provisions are made.

It is a common thing for defendants who desire to show that contracts sued upon are wagers, to call them "marginal contracts," and claim the fact that margins are put up tends to show the contracts to be of that charac-

ter. If, however, by the terms of a contract, either party does or may call for a margin, this fact can have no tendency to show that a contract in the form of a sale is, in fact, a wager. A margin is simply a protection against fluctuations in the market price of the article dealt in, and this is so whether the contract to which it relates be a *bona fide* sale or a bet upon the price. As we shall see further on, margins are used without regard to the character of the transactions, and are useful both in wagers regarding the price of commodities and in *bona fide* sales. Margins have no necessary connection with contracts for future delivery. It is quite common, however, in contracts of this character, to require margins; but it is purely a matter of credit, and a party, even though he may be speculating in futures or options, if his credit and character are good, would not necessarily be required to put up margins. By the rules of the different exchanges the members are not obliged to put up margins unless they are called for, nor do members in dealing for their outside customers as a matter of course require them. Whether or not they are called for depends upon the confidence the broker has in his principal's ability to reimburse him in case of loss.

In the case of Markham *v.* Jaudon,[1] the relation of the parties to an ordinary speculation in stocks in Wall street was considered, and Ch. J. Hunt, in analyzing the contract between the broker and his principal, stated, that the contract on the part of the customer was to pay a margin of ten per cent. on the current market value of the shares, and to keep good

[1] 41 N. Y. 235.

such margins according to the fluctuations of the market; and on the part of the broker to advance all the money required for the purchase beyond the ten per cent. furnished by the customer, and to carry or hold such stocks for the benefit of the customer so long as the margin of ten per cent. is kept good, or until notice is given by the other party that the transaction must be closed. This case did not turn upon the question whether the speculation was a wager; and no one in New York would think of claiming that, because the speculation was upon margins, it was therefore invalid. Such contracts have been sustained and enforced repeatedly in that[1] and other States.[2]

In Hatch *v.* Douglass,[3] being an action brought to recover a balance claimed by brokers in an ordinary stock speculation for their principal, the court said: "It is probably true that dealing in stocks 'on margins,' as it is called, is fraught with much evil. It encourages speculation, and induces many to engage in it who would not otherwise have the requisite means. In

[1] Staples *v.* Gould, 9 N. Y. 529; Milliken *v.* Dehon, 27 N. Y. 364; Stewart *v.* Drake, 46 N. Y. 449; Lawrence *v.* Maxwell, 53 N. Y. 19; Stenton *v.* Jerome, 54 Barb. 480; Cameron *v.* Durkheim, 55 N. Y. 425; Baker *v.* Drake, 66 N. Y. 518; White *v.* Smith, 54 N. Y. 523; Knolton *v.* Fitch, 52 N. Y. 288; Wicks *v.* Hatch, 62 N. Y. 535; White *v.* Baxter, 71 N. Y. 254; Gruman *v.* Smith, 81 N. Y. 25; Ritter *v.* Cushman, 35 How. Pr. 284; Hanks *v.* Drake, 49 Barb. 186; Clarke *v.* Meigs, 10 Bosw. 337; Brass *v.* Worth, 40 Barb. 648; Frost *v.* Clarkson, 7 Cowen, 24.

[2] Hatch *v.* Douglass, 48 Conn. 116; Smith *v.* Bouvier, 70 Pa. St. 325; Wynkoop *v.* Seal, 64 Pa. St. 361; Esser *v.* Linderman, 71 Pa. St. 76; Gheen *v.* Johnson, 90 Pa. St. 38; Child *v.* Hogg, 41 Cal. 519; Durant *v.* Burt, 98 Mass. 16; Gregory *v.* Wendell, 39 Mich. 337; McGinnis *v.* Smythe, 4 N. E. R. 759.

[3] 48 Conn. 116.

that way many people and business generally suffer more or less. But it is an evil that the existing laws do not reach. No case has been cited which declares such a contract illegal. If we should so hold it would be difficult, if not impossible, to draw the line between legal and illegal transactions."

In Pennsylvania[1] and New Jersey[2] contracts of precisely the same character have been held to be wagers; much stress being laid upon the fact that the contracts were for differences, the only amounts of money really involved being the margins. These Pennsylvania decisions are illogical, and have been severely criticised by the courts[3] and law writers;[4] the decisions in the New Jersey case, and in Justh *v.* Holliday[5] being the only ones following them.[6]

In Moeller *v.* McLagon,[7] a party residing at a distance from the city of Chicago employed a commission merchant in that city to purchase for him a quantity of wheat to be delivered at a subsequent day. He agreed to allow the commission merchant one-half of a cent per bushel as a compensation for purchasing, and to advance ten cents per bushel as a margin, and to keep it good at that sum. The original margin, as agreed upon, was paid to the commission merchant. Soon after the price of wheat began to decline, of which

[1] Maxton *v.* Green, 75 Pa. St. 166; Fareira *v.* Gabell, 89 Pa. St. 89; North *v.* Phillips, 89 Pa. St. 250; Ruchizky *v.* De Haven, 97 Pa. St. 202; Dickson *v.* Thomas, 97 Pa. St. 278.

[2] Flagg *v.* Baldwin, 38 N. J. Eq. 219.

[3] Kent *v.* Miltenberger, 13 Mo. App. 503.

[4] Dos Passos, 423; Lewis, 109; Law of the Produce Exchange, 263.

[5] 11 Wash. R. 418.

[6] For full statement of all these cases, see Chap. V, Rule I.

[7] 60 Ill. 307.

the commission merchant advised the party for whom he had made purchases, and asked for instructions in regard to the sale of the wheat. Subsequently the latter was advised that the margin had already been absorbed by the further decline in the market, and was requested to put up more margin, which he failed to do; and thereupon the commission merchant sold the wheat at a considerable loss. It was held that the margin not being kept good the commission merchant had the right to sell the grain upon the notice given.

In Sawyer *v.* Taggart,[1] it was decided that the purchaser of goods for future delivery—through a commission merchant who deposits margins—who orders a resale before the time of delivery, is liable for all losses thereby sustained; and the rules of the New York Cotton Exchange providing for the putting up of margins, was held to have no bearing upon the question of whether the transactions on the Cotton Exchange were wagers.

In Rumsey *v.* Berry,[2] the plaintiffs, at the request and for the benefit of the defendant, made an agreement for the sale of wheat to be delivered within a certain time at the option of the defendant, who was to furnish sufficient margin to secure them against loss. The defendant failed to comply with his part of the contract, and the wheat was closed out at a loss. The court said that under such a contract the law will give the plaintiffs a remedy for their loss. The plaintiffs were personally responsible for the performance of this agreement, and the defendant on his part was under

[1] 14 Bush, 727.
[2] 65 Me. 570.

obligation to furnish sufficient margin to secure them against loss in case of a rise in wheat. This he failed to do.

In Wall *v.* Schneider,[1] the court said: "True, the contract provided, in effect, that the plaintiff should be secured by a margin of ten per cent. on the contract price, and for an additional margin in case such barley should go down on the market; but this does not seem to be enough, especially when taken with other evidence in the case, to authorize a finding that neither party intended to perform the contract."

Bartlett *v.* Smith[2] was an action brought by commission merchants and members of the Milwaukee Chamber of Commerce to recover for services and advances made for the defendant's account in the purchase and sale of wheat for future delivery, and it was claimed by the defendant that the rules of the Chamber of Commerce requiring margins to be put up showed the contracts made to have been wagers. The court said: "It is not an unusual thing, where parties enter into contracts for the delivery of personal property at a future time, to put up earnest money for the fulfillment and performance of those contracts. Under these rules, what is called a margin is required for the faithful performance of the contract that is entered into. It may be that parties under these rules—members of the Chamber of Commerce—may engage in illegitimate trade, but I cannot, from reading the rules, construe them (taking them together) to intend that all contracts which are entered into by members of the chamber are gambling transactions. * * * Where

[1] 17 Rep. 700. [2] 13 Fed. Rep. 263.

the earnest money is put up in that way, and the parties agree that in case of a rise or fall in the market they may call for further security, and if that security has not been put up, the party may go into the market and buy, * * * he can recover the difference between the contract price and the price that he paid in the market."

In Whitesides *v.* Hunt,[1] it was claimed by the defendant that the advancement of margins made, were to keep the payment of differences secure. The court said: "But if it be the *bona fide* intention of the seller to deliver, and the buyer to pay, and the option consists merely in the time of delivery within a given time, the contract is valid, and the putting up of margins to cover losses which may accrue from the fluctuations of prices, it is legitimate and proper. * * * It is a legal and valid transaction, and the fact that the purchaser is required to deposit a margin, and increase the same at any time the market requires it, in order to secure the payment at maturity, or that the seller shall deposit a margin and increase the same like the purchaser to secure the delivery at maturity, does not vitiate the contract. But if at the time of the contract, it is mutually understood and intended by all the parties, whether expressed or not, that the commodity said to be sold was not to be paid for, or to be delivered, but that the contract was to be settled and adjusted by the payment of differences in price, * * * in such a case it would be a gambling contract and void, and the deposits of margins are only to be considered as attempting to secure the terms of the bet on the prices at some future time."

[1] 97 Ind. 191.

In the case of the Union National Bank of Chicago *v.* Carr,[1] it was held that "option contracts are not necessarily illegal, and the incident of putting up margins amounts to nothing unless the contract itself is illegal. * * * If the contract itself is lawful, the putting up of margins to cover losses which may accrue from the fluctuations of prices, and the final settlement of the transactions according to the usages and rules of the board of trade, are entirely legitimate and proper."

By these cases it clearly appears that the giving or requiring margins in legitimate transactions is valid.[2] It is to be remarked also that margins are not confined to speculative transactions. In sales to arrive they are frequently required to protect the parties against the fluctuations of the market price and against default by either party. On the part of the seller they would be considered as a protection to the buyer in case the seller should not deliver as he agreed, and the buyer should be obliged to go into the market and purchase; and on the part of the buyer they would be considered as a payment on account. So also where shipments are made to commission merchants, and the shipper is allowed to draw against the shipments to an amount nearly equal to the value of the articles shipped, the difference between the amount drawn and the market price is a margin. If the value of the articles shipped should depreciate so as to make the goods worth less than the advances, the commission merchant would have the right to demand a payment to make

[1] 15 Fed. Rep. 238.

[2] See also Jones *v.* Marks, 40 Ill. 313; Lassen *v.* Mitchell, 41 Ill. 101.

his margin good. So when goods are bought and kept in store by a commission merchant, margins are frequently required and paid.

Margins may be and frequently are put up between the parties to wagers, where there is a cover in the form of a sale.

In the case of Waterman *v.* Buckland,[1] the parties admitted that the real contract between them was a wager upon market prices of pork, and each party placed his check in the hands of a stakeholder for one thousand dollars. The deposits might be called margins. The transaction was in the form of what is called an option sale. Waterman purported to be the vendor, and Buckland the purchaser of the pork. It was agreed that if at the end of sixty days the price had fallen from what it was on the date of the transaction, Waterman should receive the difference from Buckland. If it had risen he was to pay the difference to Buckland. It was averred that it had fallen, and Waterman claimed five hundred dollars as the difference in price, and brought his action to recover it. The court decided that by the laws of Missouri wagers between the parties were void, and that the plaintiff could not recover. So in bucket shop business margins are always required from the party dealing with the bucket shop, but the real transactions between the parties have been decided to be nothing but wagers.[2]

In Kirkpatrick *v.* Bonsall,[3] the court said: "When ventures are made upon the turn of prices alone, with

[1] 1 Mo. App. 45.

[2] Bryant *v.* Western Un. T. Co., 17 Fed. Rep. 825.

[3] 72 Pa. St. 155.

no *bona fide* intent to deal in the article, but merely to risk the differences between the rise and fall of the prices at a given time, the case is changed. The purpose then is not to deal in the article, but stake upon the rise or fall of its price. No money or capital is invested in the purchase, but so much only is required as will cover the differences—a margin, as it is figuratively termed. Then the bargain represents not a transfer of property, but a mere stake or wager upon its price. The difference requires only the ownership of a few hundred or thousand dollars, while the capital to complete an actual purchase or sale may be hundreds of thousands or millions." This was quoted with approval in Gregory *v.* Wendell.[1]

In Melchert *v.* American Union Telegraph Co.,[2] the court said: "If it be not the *bona fide* intention of the parties that the property shall be in fact delivered in fulfillment of the contract of sale, but that the seller may, at his election, deliver or not, and pay differences, then the contract is void. Such a dealing amounts to a mere speculation upon the rise and fall of prices, which requires no capital except the small sum demanded to put up margins and pay differences."

WHERE VENDEE INTENDS TO RESELL BEFORE DELIVERY.

The fact that a purchaser of stocks or other articles for future delivery intends at the time of the

[1] 39 Mich. 337. See also Shaw *v.* Clark, 49 Mich. 384; and Lowry *v.* Dillman, 18 N. W. R. 4.

[2] 11 Fed. Rep. 193.

purchase to resell before the time for delivery arrives, does not vitiate the sale, or convert the transaction into a wager. It makes no difference whether the purchases are made directly or through a broker or commission merchant. It is always the intention of a merchant when he buys goods to resell them at a profit, and of a speculator in stocks or securities to hold them for an increase in value and then resell. This intention is the very essence of speculation, and there is no sound reason why any distinction should be made between contracts where the delivery is *in presenti*, and where it is to take place at a future time. In the latter case the articles bought are not to be delivered to the purchaser, but delivery is to be made to the party to whom the purchaser transfers his rights under the contract, and if there should be a hundred transfers it could make no difference with the character of the transaction.

Notwithstanding these propositions seem so plain, it is constantly claimed that this intention, especially where the purchases and sales are made through a broker or commission merchant, shows the transactions to have been wagers. This intention is, however, the strongest possible proof that a sale was *bona fide*, for otherwise how would it be possible for a person to intend to resell an article that he did not really buy; and if he really bought, then, as has been clearly shown, the contract could not have been a wager. There are two strong English authorities upon this point.

In the case of Ashton *v.* Dakin,[1] the facts were

[1] 4 N. & H. 867; s. c. 32 Law Times, 300.

these: The plaintiff was a broker, and was directed by the defendant to buy for him certain stock for future delivery. The plaintiff bought the stock through another broker who made a contract in his own name, and became liable for its performance. Before the day of delivery the defendant ordered the stock to be sold, and it was sold at a loss, which the broker paid. The plaintiff repaid the broker, and brought his action for the amount. The defendant pleaded that the transaction was a mere wager on the market price of the stock. The defendant, in fact, never intended a transfer of the stock, and the plaintiff was fully aware of this when the orders were given; and they were given and accepted on the implied terms and understanding that the plaintiff should not be called on by the defendant to deliver the stock or any part thereof, and that the defendant should not be called on to receive or pay for it, but that it should be resold by the plaintiff before the time of payment arrived, and the defendant should on the resale either pay or receive the difference after debiting him with the plaintiff's charges on the purchase and sale. This was held not a gaming transaction. Pollock, C. B., said: "I can see no objection to a man who has great confidence in the judgment of another, saying to him, 'will you undertake to buy for me corn, or any other article, not to be paid for till a certain time?' and then directing him to sell it again a little before that date." This case was cited with approval in the case of Sawyer *v.* Taggart,[1] which will be hereafter referred to.

In Thacker *v.* Hardy,[2] the plaintiff was a stock

[1] 14 Bush, 727.

[2] 27 Weekly Reporter, 158; s. c. L. R. 4 Q. B. D. 685.

broker, and was employed by the defendant in speculating for him on the London stock exchange. The defendant never expected or intended to receive actual delivery of what the plaintiff might buy for him, and the plaintiff knew that the defendant never expected or intended so to do, and the plaintiff knew that unless he could arrange matters as expected, that is, to sell out where he had bought, or to buy in where he had sold short, that the defendant would be utterly unable to pay for what was bought for him or deliver what was sold for him. It was understood that the plaintiff should so manage the speculation as to render nothing but differences payable to or by him as the case might be. Cotton, L. J., said: "The contract was this, that the defendant authorized the plaintiff, as his agent, to enter into contracts for the purchase of stock of such an amount that the parties must have known that defendant never intended to take them up, and could not do so, and all that he intended was that he should never be called upon to take them up, but that the matter should be arranged in another way. That, in my opinion, does not establish any such contract (a wager) as was suggested by Mr. McKenzie. It is only this, as Mr. Justice Lindley finds, that both parties knew that defendant never intended to take up the stock he had authorized the plaintiff to purchase, and that the only contract was that the business should be conducted in such a way that, so far as possible, the defendant should not be liable for anything but the differences." The plaintiff had a judgment.

In this country the case of Sawyer *v.* Taggart[1] is a leading authority. In this case Hamilton & Bros.

[1] 14 Bush, 727.

were pork packers and commission merchants in the city of Louisville, and the plaintiffs, commission merchants in New York and members of the New York cotton and produce exchanges. Hamilton & Bros. from time to time directed the plaintiffs to buy for their account for future delivery certain specified quantities of cotton, pork, and lard. As the time approached when, according to the terms of the contract of purchase, the goods were deliverable, Hamilton & Bros. directed the purchases to be transferred to subsequent months. This, as the evidence shows, was intended and understood to be a direction to sell the goods, and purchase a like quantity for delivery in the months designated. The evidence also showed that, before the maturity of each contract, Hamiltons directed the goods contracted for on their account to be resold. One of the members of the firm of Hamilton Bros. testifies that his firm never intended to receive the goods which they directed the plaintiffs to buy, but that their intention was to resell them before the time arrived for delivery. This intention was known to the plaintiffs. It was held that contracts for the sale of goods, to be delivered at a future day, are not invalidated by the circumstances that, at the time of making the contract, the purchaser intended to resell before the time appointed for delivery. The court said: "There cannot, in the very nature of things, be any valid reason why one who buys for future delivery may not resolve, before making the purchase, that he will resell before the day of delivery, and especially when, by the rules of trade and the terms of his contract, the person to whom he sells will be bound to receive the goods from the original seller, and pay the contract price."

In the case of Gregory *v.* Wendell,[1] the plaintiffs directed the defendant to purchase for them two thousand bushels of corn deliverable at Chicago in June following, and placed in the hands of defendant one thousand dollars as a margin. An action was brought, among other things, to recover back this margin on the ground that the contract was a wager and invalid. In the course of the opinion the learned Judge said: "The vendee under such an agreement may, before the time of delivery to him has arrived, agree to sell or transfer his right to the goods, or under the contract, to some one else, who, should he retain the same, would be entitled to receive possession thereof at the time agreed upon by the parties through whom he claimed title."[2]

FINANCIAL STATUS.

It has been frequently said that the financial inability of a party to a contract for future delivery to perform it, is an indication that it was a mere cover for a wager. The theory upon which these cases proceed is, that a man of small means would not undertake to perform contracts requiring large amounts of money to buy the commodities which he had sold short, or to pay for those which he had purchased, but that he would make a bet on the price, as he would then have to pay only differences if he lost. This reasoning may be sound, but it is to be observed that,

[1] 39 Mich. 337.

[2] See also as possibly opposed to these cases the later Pennsylvania cases of Fareira *v.* Gabell, 89 Pa. St. 89; North *v.* Phillips, 89 Pa. St. 250; Ruchizky *v.* De Haven, 97 Pa. St. 202; Dickson *v.* Thomas, 97 Pa. St. 278; and the case of Flagg *v.* Baldwin, 38 N. J. Eq. 219.

under the present methods of doing business, a man with a very limited amount of actual cash can and does manage very large amounts of property. Care should be taken in applying this proposition that a man's credit and ability to borrow money on the goods he deals in, or contracts which he makes, should be taken into account. Stocks, grain, cotton, and other commodities are just as good as cash. The object of all trade is to make money; and the man who can make the most upon the least amount invested, is to be encouraged rather than hampered by narrow views of law and morals. Let us examine a few of the cases in which this proposition is stated.

In Colderwood *v.* McCrea,[1] we have a decision, which, if law, would effectually prevent speculation of every kind unless the party speculating had the means of paying for the articles which he bought, and would prevent him from using his credit or the money or credit of others. In this case the court says: "It appears that McCrea & Co. commenced dealing for Colderwood on the board of trade about August, 1878. The exhibits show that during the ensuing five months they made fifty-nine different purchases and fifty-five sales, aggregating 600,000 bushels of wheat and 10,000 bushels of corn. During the period of about four months, in 1879, they made twenty-four purchases and twenty-six sales, aggregating 380,000 bushels of grain, mostly wheat, and 1,000 barrels of pork, making a total of 990,000 bushels of grain, and 1,000 barrels of pork. Here were purchases and sales which, if real and made with a *bona fide* intention and expectation that the property was to be delivered or received,

[1] 11 Bradw. 543.

would have necessitated the use of a large amount of capital. McCrea & Co. knew that Colderwood had no means other than a moderate salary. It is testified by Colderwood, and not denied by Young, that he repeatedly informed the latter as to his financial condition, and told him he had no business to gamble on the board of trade, and that Young coincided with him in thinking that he would do well to keep away, that it was a dangerous place, etc. Is it within the range of probability that a man thus situated, with very small means, and engaged in a wholly distinct avocation, should go outside his ordinary business, and contract for the purchase of one half a million dollars worth of grain and pork, in the space of nine months, with any idea or expectation of receiving or paying for it on delivery? It is argued by counsel that only a small percentage of the purchase-money is required to be paid in cash, as upon the payment of a margin other parties are readily found who will carry the goods, or before the expiration of the time for delivery a like amount can be sold, and the deal be closed by the purchaser paying the loss, if any. In other words, he gets rid of it by paying the difference; and what, we ask, is that but dealing in differences? Nor does the suggestion of counsel, that banks and capitalists furnish money to move the commodities, and thus necessitate the use of but little money of the dealer, lend support to his theory; since, as is well known, the money in such cases is not advanced upon mere outstanding contracts for the purchase and sale, but upon warehouse receipts and bills of lading, which represents goods actually on hand." For these and other reasons the court reversed the decisions of the superior court

of Cook county, where judgment had been given for the plaintiff.

In the case of North *v.* Phillips,[1] the court, in considering the facts which would determine the question, whether the stock transactions in which the parties were engaged were *bona fide* or not, said: "That the shares belonged to Phillips. He had neither paid for nor intended to pay for any of them. They were worth about this time $52,000, and Phillips himself, being judge, was not worth half that amount."

In the case of Patterson's Appeal,[2] it was determined, from the fact that the purchaser was not able to take and pay for the stocks bought for his account, that the transactions were wagers. The court said: "We are not able to distinguish this adventure from that class of cases which we have frequently designated as gambling transactions. The magnitude of the purchases made and the limited amount of money advanced, all lead to one conclusion only. The contract is unmistakably stamped with a character which the law designates gambling and will not be enforced."

In the case of Flagg *v.* Baldwin,[3] which was an action to foreclose a mortgage given by Flagg and his wife to secure losses in stock speculations through a broker on the New York Stock Exchange, the defendant pleaded that the transactions were wagers. The court, in speaking of the transactions out of which the losses grew, said that "in less than fourteen months, purchases aggregating over a million dollars were made. According to Flagg's statement, the account once held 1,300 shares of a par value of over $130,000.

[1] 89 Pa. St. 250.

[2] 16 Reporter, 59.

[3] 38 N. J. Eq. 219.

* * * These enormous transactions were far beyond the ability of appellants at any time, and were known to be so. It appears that respondent was notified that the first advance was all that the Flaggs had to speculate with. The wife's note, and consequently her bond and mortgage, were resorted to with the avowed purpose of binding her separate estate. Respondent admits that he was informed and knew that Flagg was speculating for all that Mrs. Flagg and he had in the world. Under such circumstances, it is idle to pretend that there was or could be any hope or expectation that appellants were to take, or could be required to take these vast amounts of stock. For respondents to have tendered them, and demanded payment of them, would have been absurd in the extreme. The whole circumstances show that no such right to tender entered into the transaction. On the contrary, the contract plainly was, that if the stocks bought advanced, the profit was to be realized by a sale. If they declined, the remedy of the respondent was to save himself by a sale. The settlement was to be the profits and losses thus ascertained."

In Justh *v.* Holliday,[1] the action was brought upon a note which General Custer had given to the plaintiffs in settlement of losses, which the plaintiffs had paid for him as his brokers in stock speculation, and the defense of wager was interposed. It appeared that the aggregate amount of the value of the stocks dealt in during the period covered by the account, was $389,983. The court said: "The disparity between the ability of Custer and this immense amount of purchases and sales within a half a year's time would

[1] 11 Wash. R. 418.

certainly be regarded by business men as a circumstance in contradiction of the idea that he intended to make actual contracts so much beyond his means of payment."

In Beveridge *v.* Hewitt,[1] the court said: "What the real intention of the parties was, and whether the form was merely colorable, and adopted for the purpose of covering up a series of gambling transactions, must be determined from all the circumstances of the case as disclosed by the evidence. McCurdy, at the time these dealings were being carried on, was a young man of twenty-five years of age, entirely without property or financial responsibility. He came to Chicago from Geneseo, Ill., about three years previously, and the first year after his arrival served as clerk in the office of his father at twenty-five dollars per month, and afterwards at seventy-five dollars per month, and was receiving wages at that rate at the time these dealings were in progress. He had never been in business except as clerk in the office of McCurdy & Beveridge, and was not, and never had been, engaged in buying or selling grain, corn, pork, lard, or other like commodities. * * * The plaintiff may be presumed to have been aware of his pecuniary circumstances and business relations. Under these circumstances, and for such a party, these brokers, in the course of little over two months and a half, purchased property amounting in value to over two hundred thousand dollars. * * * To believe that either he or Hewitt, Bliss & Co. had any expectation or intention when these contracts were made that the grain purchased should be actually delivered or received, requires a

[1] 8 Bradw. 467.

stretch of credulity of which no man of common understanding would be guilty."

In the case of the First National Bank of Lyons *v.* Oskaloosa Packing Company,[1] the action was brought to recover the sum of fifteen thousand dollars on a note given by the defendant for losses made in the purchase of pork through a broker on the Chicago Board of Trade. The defense was that the transactions were wagers. The Packing Company had no assets, except what was invested in its real estate and the tools, implements and fixtures necessary to carry on its business. The capital stock of the company was $50,000. The court in its opinion threw great stress upon the fact that so large an amount of money was required to perform the contracts made on account of the Packing Company, quoted largely from the case of Flagg *v.* Baldwin,[2] and said: "It cannot, with any plausibility, be claimed that either of the parties to these transactions intended and expected to take the sixty thousand pounds of ribs."

In the case of *In re* Green,[3] the court said: "It is self-evident from the testimony and the condition of the parties that these sales were not *bona fide*. The bankrupt was not a dealer in grain. He was a country merchant of small or no means, and had no money to invest in wheat, that is, to pay for the wheat, which last fact Green, his brother, and Norris, knew. The idea that they bought for him several thousand bushels of wheat with the expectation that he was to pay for it is preposterous. He swears

[1] 23 N. W. R. 255.
[2] 38 N. J. Eq. 219.
[3] 7 Biss. 338.

that he did not, and it is apparent that he could not, and that they knew it."

In Kirkpatrick *v.* Bonsall,[1] the action was brought to recover damages for breach of a contract in which the defendant had given the plaintiff the option to call for petroleum or not as he wished. The plaintiff paid for this privilege one thousand dollars in money. The plaintiff produced in evidence the contract, and proved a demand for a certain portion of the oil mentioned in it, a tender of the money according to the terms of the contract, and a refusal by the defendant to deliver. The defendant was asked upon cross-examination what other contracts he had at the time he entered into the contract sued upon. This was done for the purpose of showing the magnitude of the plaintiff's undertaking in the way of purchases of oil, to be followed by evidence of his financial inability to take and pay for the amount of oil specified in said contracts. The offer was rejected by the court. The defendant asked the court to instruct the jury that the plaintiff could not recover upon the contract sued on. This the court refused, and charged that the plaintiff was entitled to recover. The Appellate Court said: "Every offer of evidence is to be judged of by the court upon the state of the evidence already in, or of that with which the offer is proposed to be followed. How then did this case stand when the offer was made? The plaintiff had given in evidence a written agreement; not illegal, it is true, on its face, but of that kind used in gambling ventures. The defendant had shown by the plaintiff's own testimony that he was not a refiner of oil, or one who would buy for his own consumption

[1] 55 Pa. St. 155.

—that he had not sold the oil when he made use of his call or option, and therefore had no contract of his own to fulfill—and also that he did not intend to call for the oil if the market price had gone below the price fixed in the agreement. What intent would reasonably be inferred from these circumstances? Certainly the belief induced was that there was not an intent to bargain for oil for a real business purpose. Now if besides this contract it could be shown that many others of a similar kind were entered into by the same man, at and about the same time, certainly it would strengthen the conviction that the plaintiff was not a *bona fide* contractor in a legitimate business, and if we then add to this the fact that he was financially unable to take and pay for the total amount of oil he contracted for, that conviction would be more firm, and that the real nature of his contracts was a wager on the rise and fall in the prices of oil. The offer went therefore to the very question whether he was gambling in the price of oil."

It seems quite difficult to reconcile these cases with a knowledge of the methods by which business in large cities, and especially on the exchanges, is now done. The Pennsylvania cases and Flagg *v.* Baldwin were all cases of speculation in stocks, and in every instance it was proved that the stocks bought and sold were actually delivered by or to the brokers who were employed, and it is not correct nor fair to say that they were dealing in differences. The ordinary groceryman who buys a bushel of potatoes at one price and sells them at another is dealing in differences in exactly the same way. He is after the profit, and that is the "difference"

between the purchase price and the selling price, provided the latter be the greater; and if the selling price is less than the buying price the "difference" is the loss.

The argument so strongly urged in these cases, that the party dealing in such enormous amounts is not able to pay for them, is without force, and has no necessary tendency to show the contracts were not *bona fide.* Take for instance the case of Flagg *v.* Baldwin.[1] The transactions here were the ordinary transactions of the New York Stock Exchange; Flagg and his wife bought and sold stocks through a broker; the stocks were actually delivered and paid for in every instance. It is true that Flagg was speculating, and risked his and his wife's entire property. But the fact appears that they were able to pay the losses. The amount of money represented by the shares bought and sold is no criterion of the ability of a party to pay for his losses in such transactions. The entire amount lost and sued for, was only about $12,000, and the Flaggs could have paid this amount had they desired to do so. So in the case of The First National Bank *v.* Oskaloosa Packing Co. The amount of money sued for was fifteen thousand dollars. It appeared that the capital stock of the company was fifty thousand dollars. So in the Pennsylvania cases the amount of the loss was very small in comparison with the amount of the value of the stocks dealt in. These cases seem to have proceeded upon the theory that because a man could not buy or pay for the articles

[1] 38 N. J. Eq. 119.

he dealt in he did not intend his contracts to be *bona fide.* When we consider, however, that a party buying stocks, for instance, can immediately without any trouble and at a small interest, borrow money up to within ten per cent. or even less, of the value of the stocks, or, when having grain or other commodities, he may accomplish the same results by using the warehouse receipts, it plainly appears that the force of this argument is broken. To say a man cannot buy what he is not able to pay for, is to destroy the whole credit system, and in effect it would prevent the greater part of legitimate speculation, and paralyze business.

In the recent Ohio statute[1] it is provided that where a party contracts or offers to buy or sell flour, grain, or wheat, &c., which he does not own, or when the purchaser of the same so contracting to buy or offering to buy has not the means to pay, the contracts are against public policy, null, and void. This is the first and only statute of this character known to the author, and it remains to be seen what the effect of it will be. If it should be strictly enforced, it would make a vast difference in the business prosperity of the State of Ohio. Probably, however, it will share the fate of similar statutes, as it is quite impossible to control, as well as unwise to attempt to regulate trade in that way.

In the case of Thacker *v.* Hardy,[2] it appeared that the defendant speculated through the plaintiff, a stock broker and member of the London Stock Exchange.

[1] See page 21.

[2] 27 Weekly Reporter, 158; s. c. L. R. 4 Q. B. D. 685.

Large amounts of stock were bought and sold for the defendant's account. He knew that he incurred a risk of having to accept or deliver the stock as the case might be, but was content to run the risk in the expectation and hope that the plaintiff would be able to arrange matters so as to render nothing but differences payable to or by him; and unless the plaintiff could arrange matters as expected the defendant would be unable to pay for what was bought or deliver what was sold. There was evidence showing that the defendant was a reckless speculator, and that the plaintiff knew it. After a very elaborate argument and discussion by counsel and the court it was decided that the plaintiff was entitled to recover what he had paid out for the defendant's account. And this seems to be the better doctrine, notwithstanding the many American authorities opposed to it.

THAT THE PARTIES WERE ENGAGED IN A LARGE NUMBER OF MERE SPECULATIVE TRANSACTIONS.

In Irwin *v.* Williar,[1] the court said: "It might therefore be the case that a series of transactions such as that described in the present record might present a succession of contracts perfectly valid in form, but which on the face of the whole, taken together, and in connection with all the attending circumstances, might disclose indubitable evidence that they were mere wagers. The jury would be justified in such a case, without other notice than that of the nature of the transaction, in reaching and declaring such a conclusion."

[1] 110 U. S. 499.

In Beveridge *v.* Hewitt,[1] it appeared that between the first of January and sometime in April following, forty-four different deals were made, and the court said: "Perhaps the most significant proof on this subject is to be derived from the manner in which the business itself was conducted. Forty-four different purchases were made, also the same number of sales, yet no property was in fact delivered, or offered to be delivered. Instead of this every deal was closed out long before the period of delivery arrived, by a counter purchase or sale."

In Fareira *v.* Gabell,[2] the court said: "Let us suppose that A. agrees with B. to buy a thousand bushels of wheat, at two dollars per bushel, to be paid for and delivered at the end of thirty days. If wheat rises in value, A. will be the gainer, and if it goes lower he will lose; but inasmuch as the apparent object of the contract is an actual purchase of the wheat, it is not a gaming contract. Nor could such a contract be justly regarded as a wager, although when the time for the delivery of the wheat arrived, it was agreed that B. should, instead of forwarding the wheat to A., pay him the damages to which he would be legally entitled for the refusal to deliver; that is to say, the difference between the stipulated price and the actual value of the wheat at the time fixed for the fulfillment of the contract. Such a settlement of the difference would not, if there was nothing more, be a sufficient ground for inferring that the contract was a gambling contract, or contrary to law. But the case would be materially different if the evidence, taken as a whole, showed that A. and B. did not really intend to buy and sell; that

[1] 8 Bradw. 467.

[2] 89 Pa. St. 89.

there was no intention on the one hand to deliver, or on the other to receive, the wheat, and that their real purpose was to make a wager in the form of a contract of sale. Hence, if A. and B. were to deal with each other in the way supposed, during a series of months or years, and it appeared in evidence that B. did not, in any single instance, forward the wheat, or have it in readiness for delivery, and that when the time arrived for the fulfillment of the successive contracts, they were always settled by the payment of a sum of money answering to the rise and fall in the price, the question would then be one of fact for the jury, whether the parties really intended to buy and sell, or to make a wager on the price of the grain."

In Kirkpatrick *v.* Bonsall,[1] it was said: "If besides this contract it should be shown that many others of a similar kind were entered into by the same man, at and about the same time, certainly it would strengthen the conviction that the plaintiff was not a *bona fide* contractor in a legitimate business."

It is difficult to understand how any number of speculative transactions can make the last one invalid. It may tend to show that the party speculating does not intend to receive or deliver personally or by his agent the articles speculated in. But this, it is perfectly clear by reason and authority, does not make a contract in the form of a purchase or sale a wager. It is perfectly lawful to make such a contract, the purchaser intending at the outset to transfer all rights in it to another before the time for delivery arrives, and so avoid the necessity of delivery and payment between

[1] 72 Pa. St. 155.

the original parties, and, if it is lawful to do this once, it is lawful to do it any number of times.

If, in the case supposed in Fareira *v.* Gabell,[1] all of the transactions were between the same principals, the fact that they were always settled by the payment of differences would be strong evidence that it was understood in the beginning that the contracts were not to be enforced. But such cases are extremely rare. If the principal is dealing through a commission merchant or broker, and real contracts are made by the latter, the fact that all of the transactions were settled between the commission merchant or broker and his principal, can have no tendency whatever to prove that any given transaction made by the commission merchant with other parties was a wager. In cases of this character a wrong test is frequently employed. The only accurate test of any given transaction is to inquire if it understood that neither party to it may enforce the contract in the form in which it was made. The fact that the commission merchant so manages the business of his principal that he is enabled to transfer the principal's rights under the contracts to other parties, and thus leave differences in his own hands which he pays over to his principal, even though it be repeated hundreds of times, does not make the contracts, entered into by the commission merchant for his principal, wagers.

In Sawyer *v.* Taggart,[2] the court said: "It is next contended that such understanding is shown by the fact that in the whole course of dealing between Sawyer, Wallace & Co. and Hamiltons, extended over a period of about two years, and amounting in the ag-

[1] 89 Pa. St. 89.

[2] 14 Bush, 727.

gregate to several hundred thousand dollars, no goods were ever actually received by either on account of any of said transactions. This argument would have much force but for the fact that all these transactions were had with the same intention to resell, and the further fact that sales were actually made in all instances, just as in those we are considering. If one such transaction might be legally had, then many made with the same object in view would be equally lawful. But instead of furnishing evidence of a tacit understanding that the contract was to be settled by the payment of differences, this long course of dealing, in which it does not appear that any contract was so settled, rather conduces to disapprove the existence of such an understanding."

PRIOR CONVERSATIONS—PRIOR DEALINGS.

In Brand *v.* Henderson,[1] the action was to recover the price of wheat, bought by the plaintiff as factor of the defendant for future delivery. The defense was that the transaction was a gambling contract, and that no delivery of the wheat was intended, but only an adjustment of differences in price was to be made. It was held error to refuse to let the defendant testify as to conversations had by him with the plaintiff before the orders for the purchases were actually given. The conversations were admissible as throwing light upon the nature of the contract, and as part of the *res gestæ;* it not being the last word spoken, which in all cases gives character to the transaction.

[1] 107 Ill. 141.

In Colderwood *v.* McCrea,[1] the court said: "In order to ascertain the intention of the parties to this particular transaction, it was competent to show how they were in the habit of dealing together in respect to like transactions, prior to the one in controversy."

RULES OF THE EXCHANGES—USAGES.

It is not proposed in this section to speak of the rules of the exchanges except so far as they have been the subject of controversy in the courts upon the question of whether they indicated that transactions conducted in accordance with them were wagers.

In Wall *v.* Schneider,[2] the action was brought to recover damages for the breach of a contract for the future delivery of warehouse receipts for barley. In the court below a judgment was directed for the plaintiff, and upon appeal the learned judge said: "It is urged that the written contract, with the rules and regulations of the Chamber of Commerce, which are made a part of it, is upon its face a gambling contract, and hence void. In order to so hold, we first find, as a matter of fact, that at the time of making the contract the plaintiff had no intention of selling or delivering the warehouse receipts as therein stated, and also that the defendant had no intention of buying or receiving such receipts. Can we so find upon the evidence in this case? True, the contract provided, in effect, that the plaintiff should be secured by a margin of ten per cent. on the contract price, and for the additional margin in case such barley should go down on

[1] 11 Bradw. 543.

[2] 17 Rep. 700.

the market; and also provided a summary method for closing out the transaction in case the defendant failed to pay the money and take the warehouse receipts at the time designated. But this does not seem to be enough, especially when taken with other evidence in the case, to authorize a finding that neither party intended to perform the contract. Under one of the rules of the Chamber of Commerce, made a part of the contract, a failure on the part of the plaintiffs to deliver the warehouse receipts, as agreed in the contract on the receipt of the price, would have subjected them to suspension and expulsion from the Chamber of Commerce. By another rule the defendant, making default in the payment of the money and receiving warehouse receipts for the space of one month, thereby subjected him to being barred from any right to representation upon the floor of the Chamber of Commerce for any business, object, or purpose whatever. Thus the rules and regulations contemplated the enforcement of the contract, as well as the putting up of margins and the settling of differences. * * * Is the contract in question to be condemned as illegal, merely because it provided, in effect, that in case it should be broken by either party the measure of damages should be the difference between the contract price and the price on the Chamber of Commerce at the time of the breach? Assuming that such price on the Chamber of Commerce at the time of such breach would be the true market value, then it is manifest that the amount of damages thus stipulated for was precisely the measure of damages which the law would have given for such breach without any stipulation." The judgment was affirmed.

In Sawyer *v.* Taggart,[1] it was contended that the rules of the New York Cotton Exchange are so formed, and the course of dealing there is such, that deliveries cannot be enforced, and that this proves, or tends to prove, that the parties understood the contracts were not to be enforced. Rules four, six and eight of the Cotton Exchange, as they were then numbered, were indicated as establishing this view. The court said: "Rule four provides that either party to a contract may close or cancel it upon notice, in writing, to the opposite party at any time before notice of delivery. But how? the rule goes on to provide 'that the party to whom notice is given has the option either to make settlement (*i. e.*, to pay or receive differences), or to receive a satisfactory contract made equal to that held by him.' Upon such a notice being given, the party receiving it is not compelled to accept settlement by payment of differences. He has, by the express language of the rule, the 'option' to demand another contract equal to that held by him. The only effect of the rule is, that if the party giving the notice can procure a party satisfactory to him to whom notice has been given to take his place and perform the contract, the contract of such person must be accepted in lieu of the original contract. This is but a reasonable regulation, which, while it does not deprive the party receiving the notice of the right to demand the thing purchased, or to deliver and receive payment of the thing sold, may be, and doubtless is, of great practical value and importance to trade, and in no way tends to facilitate fictitious trading or gambling on market prices. Practically, the rule amounts to this, that the party to whom notice

[1] 14 Bush, 727.

is given must pay, or accept payment of the difference, or accept a satisfactory person in the room and stead of the party giving the notice, and discharge him, and look to his substitute for performance of the contract. Rule six relates to margins, and we do not perceive that it has any bearing upon the question in this case. Rule eight relates to settlements when there has been a default in delivering or receiving cotton due on the contract. It provides, that in such cases the seller making default shall settle at one quarter of a cent per pound above the average quotations for spot cotton on the day of delivery, and that a buyer making default shall settle at the average quotation for spot cotton on the following day with the addition of one quarter of one cent per pound in favor of the seller; and it also provides 'that no defaulting party can claim settlement under this rule except upon evidence that the default was unintentional, and not premeditated.' Liability for such a penalty for default, and a provision for this summary mode of making settlements in such cases, would seem to be a sufficient and salutory guaranty for the performance of contracts, and instead of affording facilities for, or furnishing evidence of, gambling on the turn of prices, seems well calculated to insure that good faith and promptness so indispensable in commercial transactions. Without noticing other provisions of the rules, it may be remarked that they seem to provide for real and not fictitious trade; that they provide against unreal transactions; and that so large a portion of the real business in the great cities is done on 'change as to wholly forbid the conclusion that all contracts made on them are unlawful, and unless such conclusion could be reached, the

contracts involved here must be held to have been valid and lawful."

In the Union National Bank of Chicago, Illinois, *v.* Carr,[1] the court said: "If the contract itself is lawful, the putting up of margins to cover losses which may accrue from the fluctuations of prices, and the final settlement of the transactions according to the usages and rules of the Board of Trade, are entirely legitimate and proper."

The case of Williams *v.* Carr[2] involved the legality of the transactions on the New York Cotton Exchange. Written contracts were made between Williams, Black & Co. and the defendant's intestate, and by the terms of the contract they were made in view of, and in all respect subject to the rules and conditions established by the New York Cotton Exchange. The court said: "The Cotton Exchange is a corporate institution with authority to make rules and regulations for the government of the cotton trade in the city, and not inconsistent with the laws of the State and of the United States. * * * Looking into the pamphlet which accompanies the case and contains the charter and regulations of the Cotton Exchange, by which, in the absence of express provisions, the contract is to be interpreted and executed, we find nothing inconsistent with entire good faith or casting suspicion upon the integrity of the transaction. Rule eight of the association is framed to insure delivery and acceptance of the subject of traffic, and imposes upon the defaulting party a penalty of one-quarter of a cent per pound in addition to the difference between the contract price and market value of the cotton at the time when it should be de-

[1] 15 Fed. Rep. 238. [2] 80 N. C. 294.

livered or received. Now while it is true the form of the contract may cover and conceal an understanding between the parties to it, that the payment of differences in the price, as the case may be, on the day of delivery shall discharge the obligation, and such understanding if found to exist would render it illegal as a wagering contract, no such intent can be gathered from its terms, nor from the rules of the Cotton Exchange applicable to it. It would be a singular circumstance if its rules were such that contracts made pursuant to them could be avoided for illegality, in a State whose laws as expounded by the courts are as stringent and relentless in the condemnation of wager or other contracts contravening public policy, as those of any other. These rules and the series of minute regulations by which the cotton trade is controlled, appear obnoxious to no just criticism, but on the contrary calculate to secure the faithful execution of engagements, and the obtaining of just compensation for their breach from the party in default."

The case of Bartlett *v.* Smith[1] involved the consideration of the rules of the Chamber of Commerce of Milwaukee. When the plaintiff's testimony was closed the defendant moved the court to instruct the jury to find a verdict for the defendant, but the judge declined to do this. It was held that contracts, made subject to these rules, were not upon their face gambling contracts. The court said: "Now, the first part of this section 5 of rule 9, provides that—'any party who shall contract to buy or sell property, and who shall fail to respond within the next one and one-half banking hours, after having been called on for security

[1] 15 Fed. Rep. 263.

(margins, in case the property rises or falls), as hereinbefore provided, shall be adjudged to have defaulted on his contract; and in case of such default, the party who has called for such security shall have the right to buy or sell (as the case may be) the property named in said contract, in the quantity and for the time of delivery specified in said contract, and all differences between the contract price and the price at which the property may have been sold or bought (as the case may be), in consequence of such default, shall constitute the rule and measure of damages against the party in default; provided, that in case the party calling for security shall elect not to buy or sell the property, as hereinbefore provided, he may have the right, by giving notice to the delinquent (as provided by section 6 of this rule), to consider the contract then terminated at the market price of the property named for the delivery specified in the contract. And the party so terminating the contract may forthwith proceed against the party so defaulting for the collection or enforcing payment of all damages sustained by reason of such default; and the rule and measure of such damages shall be the difference between the contract price and the market price (at the time of giving such notice) of the property named for the delivery specified in the contract.' * * * These contracts were entered into for the purchase or sale of a certain amount of wheat at seller's option for future delivery. Now, suppose A. had sold B. 5,000 bushels of wheat to be delivered in August, seller's option at $1; the wheat falls off five cents, and B. calls for further security (under these rules and regulations), which is not put up by A. Now, under this rule, A. having failed to put up further se-

curity has defaulted. Now, then, B. can go into the market and buy 5,000 bushels of wheat at the market price (that is, it must be an actual purchase), and in case he brings suit against A., what is the measure of damages? It would be the difference between the price which he paid when he went into the market, and the contract price. That is the legal rule of damages. Where the earnest money is put up in that way, and the parties agree that in case of a rise or fall in the market they may call for further security, and if that security has not been put up, the party may go into the market and buy 5,000 bushels of wheat (in this instance, say), he can recover the difference between the contract price and the price that he paid in the market for the wheat. It may be this is all sham. It may be these parties have entered into contracts of this character, and instead of going into the market, have merely drawn up between third parties and themselves contracts, which upon their face purported to be the purchase and sale of wheat, when it is never intended that there shall be an actual delivery of wheat at all. If this is so, then it is a gambling transaction. * * * Now, the proviso to section 5, which is read by counsel here, is one under which gambling contracts might be entered into, but it does not necessarily follow that when a contract like this in evidence is entered into by a member of that chamber, although providing that it is subject to the rules and regulations of the Chamber of Commerce, there shall be no actual delivery of wheat. * * * I shall leave it to the jury, gentlemen, to determine whether there has been, in the first instance, any actual sale and delivery of wheat."

The deliveries by notices of delivery and warehouse receipts, provided by the rules of the New York Cotton Exchange, were approved in Sawyer *v.* Taggart.[1]

In Clarke *v.* Foss,[2] in speaking of the rules of the Chicago Board of Trade, the court said: "It appearing in evidence that if any member fails or refuses to perform his contract by delivery or receiving grain he had agreed to deliver or receive, he is subject to the discipline of the body; and if the offending member is still refractory and contumacious, he is suspended or finally dismissed from the board; thus adding to the penalties which the law attaches to a violation of contracts, the sanction of a wholesome family discipline."

In Bartlett *v.* Smith,[3] the court said: "The jury may look to the usages of the trade or the business to learn the real intentions of the parties."

RINGS.—RINGING OUT.

What is a "ring," and what does "ringing out" mean? Let us suppose that commission merchant A. has sold a certain quantity of grain for future delivery for one customer, and bought for another customer a like amount for like delivery, but at a different price, and the purchase and sale were made with another commission merchant, B., dealing for different customers. The two commission merchants then make a settlement between themselves, one paying the difference to the other, as the case may be. This is called a "direct settlement," but it is also a small "ring." The result of such a transaction is this: The contracts which the

[1] 14 Bush, 727.
[2] 7 Biss. 540.
[3] 13 Fed. Rep. 263.

commission merchants have made with each other are cancelled, and the contracts of the two principals of each commission merchant are substituted each for the other. The substituted contracts would be executed as follows: When the grain is delivered by the selling customers to the commission merchants, they deliver it over to the customers who have bought. The difference between the two prices is precisely the same that one commission merchant has paid to or received from the other. The first advantage of such an adjustment of the accounts between the two commission merchants, is that several deliveries are avoided. If the grain had followed the course of the original contracts it would have been delivered to A. by the customer who has sold it, and by A. delivered to B., and B. would have delivered it to the customer for whom he has bought. On the other hand, the customer for whom B. has sold would have delivered it to B., B. would have delivered it to A., and A. would have delivered it to his purchasing customer. A "direct settlement" obviates this roundabout course of deliveries with precisely the same result to all parties. The second advantage accruing is that margins put up by the commission merchants between themselves are released as soon as the settlement is made. This is of considerable importance to them, because in a great number of transactions the margins would amount to quite a large sum of money. Both of these advantages result very greatly to the benefit of the customers, because, otherwise, so many deliveries having to take place, and so much money being required to be kept up as margins, it would be impossible to do business at the rates now charged as commis-

sions. One has but to watch for a few moments the course of business on one of the large exchanges to appreciate this. The illustration shows very clearly that a "ring" is simply a plan devised to make quick and inexpensive deliveries, and dispenses with useless and repeated deliveries of the same article.

Again, let us suppose that A. has sold to B. grain for future delivery at forty cents a bushel, and B. has sold a like quantity to C. for the same delivery at forty-five cents, and C. has sold a like quantity for the same delivery to A. for fifty cents. A. is a commission merchant dealing for two separate principals. Now, let us follow the course this grain would take when the time for delivery arrives. A. having received it from his selling principal, delivers it to B., and B. pays him forty cents; B. delivers it to C., and receives forty-five cents; C. delivers it to A. and receives fifty cents; A. delivers it to the customer to whom he has sold it, and receives back the fifty cents. Now, what is the result of this roundabout delivery? A. has sold for one customer at forty cents, and he has bought for another at fifty cents. The only advantage to him is his commissions, because the forty cents he receives from B. he pays over to his selling customer, and the fifty cents he pays to C. he receives from his buying customer. But of what possible use is it to the commission merchant, or to the customers he represents and does business for, to require that the grain should follow this course of delivery, when the same result can be accomplished in a much easier way? This grain was sold by A. for forty cents, and was finally bought again by A. for fifty cents, being a difference of ten cents. Inasmuch as B. bought the grain at forty

cents, and sold it at forty-five cents, he has made a profit of five cents; and as C. has bought it at forty-five cents, and sold it again to A. at fifty cents, he has also made a profit of five cents. These two profits make the ten cents. Now, if these three parties come together, and agree that A. shall take the grain which he has sold for one customer, and deliver it to the customer for whom he has bought, in that way leaving in his hands ten cents, five of which he gives to B. and five to C., precisely the same result follows as by the roundabout delivery. Bringing these parties together is called forming a "ring," and the mutual settlement between the parties is called "ringing out." A "ring" may contain three or more persons, and is usually formed by runners from the different offices, who find out the members of the exchange having contracts for like deliveries. No person has a right to demand that a ring should be made, and it frequently happens that a party, who might form one of a ring, declines to do so.[1] The arrangement is simply one for saving trouble and expense, and relates solely to the method of settling the mutual accounts of commission merchants with each other. They have no effect whatever upon the rights of the customers of the commission merchants, because the commission merchants in all cases guarantee that the contracts which they make for their principals shall be faithfully executed, and this is universally understood on the exchanges and considered a part of the agreement between the customers and the commission merchants; and the customers look to no one but their

[1] By the laws of the New York Cotton Exchange a member who is discovered to be in a "ring" is compelled to "ring out."

respective commission merchants as the responsible parties in their dealings.[1]

If the "ring" is formed between principals only, the element of final manual delivery of the commodity by one customer to the other through a commission merchant would not take place. In such a case the whole line of transactions would be settled without actual manual delivery. The fact, however, that such a combination *might* be made, certainly can have no tendency to prove that any of the contracts when made were not *bona fide.*

"Ringing out" is not confined to contracts for future delivery; "rings" are often formed to facilitate the delivery of goods sold for present delivery.[2] Substantially that is done by the system of delivery by warehouse receipts described in the section on symbolical delivery. A "ring" is a small temporary clearing-house, and "ringing" is conducted on precisely the same principle as the clearing-houses are.

What tendency does the fact that "rings" are made and contracts "rung out" have as showing any given transaction or series of transactions to be wagers? Manifestly, if what has been before stated is true, it can have none, but has, in fact, quite the reverse effect. Parties would not "ring out" bets, nor would accounts be adjusted through clearing-houses if they

[1] In making this statement the author has not overlooked the cases of Irwin *v.* Williar, 110 U. S. 499, and Higgins *v.* McCrea, 116 U. S. 671; but he believes that the true relation of the modern commission merchant—a member of an exchange—with his principal, is more accurately shown in the case of Gregory *v.* Wendell, 40 Mich. 432. Considered in reference to the subject of wager, the text is accurate.

[2] This was done in Clarke *v.* Foss; see following page.

were mere wagers, as there could be nothing gained thereby.

In the case of Clarke *v.* Foss,[1] the court, in speaking of how certain contracts for the future delivery of corn, made on the Chicago Board of Trade, were executed, said: "At about the time or a little before these contracts were matured, as they did on the last day of November, the defendants performed a part of them on behalf of C. B. Stevens & Sons by a purchase and actual delivery of the corn to the parties to whom the sales were made. The evidence shows that as to 20,000 bushels of corn there was an actual delivery of corn, and as to 10,000 more a delivery of warehouse receipts for that amount. As to the balance of the corn contracted to be sold, the defendants went upon the market and purchased it of different parties, and had it ready for delivery; and then, finding other parties who had similar deals for November purchases and sales, formed rings or temporary clearing-houses through which, by means of a system of mutual off-sets and cancellations that had grown up on the board, the contracts were settled by an adjustment of differences, saving an actual delivery and change of possession." And quoting from the testimony of the witnesses the court said that "this adjustment of differences is a mere matter of convenience to the members of the board and to their customers; no person is under the least obligation to settle in that way; that dealers may and often do insist upon actual delivery of the grain; and that settlement frequently saves to their customers the costs of insurance and storage. The object of forming these rings or clearing-houses is to

[1] 7 Biss. 540.

close out the transactions and get them off their books, and this is what they call ringing it out. But that, it frequently happens, cannot be done in that way, as if, for any reason, one whose assistance is essential to complete the circle prefers an actual delivery, in which case the 'ring' is burst, and then each must perform his agreement by actual delivery of the grain. Their testimony is full, and fair, and intelligent, upon the questions at issue, and they are corroborated by several other witnesses, ex-presidents, ex-directors, and ex-commissioners of appeal, and present members of the board of trade. The testimony is conclusive that this business is done much in the same way that all the other business of the board is done respecting contracts for the future delivery of grain. * * * The seller is bound not only by the contract, but by the rules of the board to which it is made subject, to perform his contract by an actual delivery, unless excused from performance by the acts of the other party; and for a violation of this rule he is subject to the discipline of the board, and to be dismissed therefrom, if he insists upon the violation of his contract." And further on the court says: "If the transactions disclosed by this case were illegal, then the greater part of the banking and clearing-house transactions in our great commercial centres are illegal also. I am pursuaded that to hold them so would be trenching too severely upon the business of the commercial world without any corresponding benefit to be expected from it."

In the case of Kent *v.* Miltenberger,[1] the ordinary contract for future delivery used in the Chicago Board

[1] 13 Mo. App. 503.

of Trade, was under consideration, and while an excellent case in many respects a wrong meaning is given to the words "ring" and "ringing out." The court said, in reference to these contracts, that "delivery is always contemplated, not as a thing which will be necessarily insisted upon, but as a thing which the purchaser may insist upon. It sufficiently appears that this is the one thing which gives vitality to such contracts and which enables those who, during a particular month are on the successful side of them, to get up what is known as a 'corner.' This happens when a much larger amount of any given commodity has been sold for future delivery within a given period than can be purchased in the market. The buyers, who are called in the slang of the exchanges the 'longs,' then insist upon delivery, and by this means succeed in running up the prices to a fictitious point, at which the 'deals' are 'rung out,' between the dealers by payment of differences, or, where the purchaser insists upon it, by actual delivery." The court then considering how such a contract valid on its face might be a wager, said: "This agreement, contemporaneous with the contract, that it may be discharged, not by actual delivery, but by the payment of differences, or by 'ringing out,' as it is expressed in the slang of the exchanges, is therefore the one thing which renders the contract void." It is possible, if a member of an exchange should agree with his principal that the contracts made for his account should be rung out, so that nothing but differences would be received or paid by the principal, this would make the contract of agency a cover for wagering. This is discussed elsewhere.[1] In such a case the broker would take the

[1] See Chap. V, Rule V.

chance of being able to "ring out" his contracts; but no member of an exchange could with safety make such an agreement, because he could never know whether rings could be formed, as that depends upon the right combination of members to form them. The opinion is hazarded that a contmporaneous agreement, such as is mentioned in this case, was never made.

In Melchert *v.* American Union Telegraph Co.,[1] the character of transactions, claimed to have been sales of rye to A. M. Wright & Co. and others for future delivery, made on the Chicago Board of Trade by one Gerstenberg, the factor of the plaintiff, was considered in relation to their being wagers, and the court said: "There is no evidence that either Gerstenberg or Wright & Co. ever bought or owned a bushel of rye to deliver on their contracts. They settled by the payment of differences. It is perfectly evident that it was Gerstenberg's purpose, in the purchase of the 15,000 bushels of rye from Wright & Co., to lay the foundation of a settlement in that way. Neither he nor Wright & Co. had evidently the least idea of investing money in these respective purchases for actual delivery. This is made further evident by the account which Gerstenberg gives of the remaining 5,000 bushels which he had sold in August to another party for September delivery, at 68½ cents, on the plaintiff's account. This, he tells us, was settled by a 'ring,' of which he gives the following account: The party to whom he had sold this 5,000 bushels had the same quantity and quality of grain sold to Lyon & Co.; Lyon & Co. had the same thing sold to Nichols & Co., Nichols & Co. to Wright & Co., and Wright & Co. delivering to

[1] 11 Fed. Rep. 193.

Gerstenberg, as stated above. Instead of Wright & Co. delivering the rye to Gerstenberg, and Gerstenberg to the other people, and so on, so that eventually it would come back to Wright & Co., Gerstenberg simply paid the difference in the money value, and that is what the trade terms a 'ring.'"

It is quite impossible to reconcile this case with Clarke *v.* Foss and Kent *v.* Miltenberger. And, if the argument is sound, it would result in prohibiting all trading for future delivery. The learned judge seemed to understand what a ring is, but his conclusions amount to this: that all speculative transactions for future delivery on the board of trade are wagers, because they are all made so far as the commission merchant is concerned in the view and hope of possible, and in some cases compulsory, settlement by "ringing out." The learned judge, it is true, says that this expectation of "ringing out" showed there was no intention to deliver. If it did show this, or tend to do so, then his argument would be sound; but it is submitted that, as has been before shown, it cannot have any such tendency.

In Beveridge *v.* Hewitt,[1] the court said: "It appears from the testimony of members of the firm that while by the rules of the board all contracts are made between the members in their own names, yet it is the usual practice and course of business with the members, when it is possible, to settle up the deals as between themselves, by rings or counter trades, and that most of their trades are settled in that manner, without the actual delivery or receipt of the commodity bought or sold. McCurdy, who claims to have

[1] 8 Bradw. 467.

some knowledge of the usual practice of the board, testifies that millions of bushels of corn are bought or sold in option trades where no delivery is ever made, and where the commodities bought and sold are never seen; that more pork is often bought and sold each day than there is in Chicago, and it is never expected that a small dealer is to take the property purchased. None of these facts are contradicted by any of the witnesses. Such being the general course of business on the board, participated in, as it must be presumed, by the members, an intention to deal in accordance with such custom will be imputed to all who enter into transactions of this character. The business of the board being so organized as to facilitate fictitious transactions in the settlement of differences, an inference arises, whenever the course of dealing is shown where one of the parties intends to settle in that manner, and carries such intention into effect, that his intention is participated in by all the parties with whom he deals."

The important point of this case, so far as it affects the subject we are now considering, is the conclusion of the learned judge that because trades are made in the expectation of ringing them out by means of counter trades, and are in fact rung out, that they are fictitious, and also that all parties to them are presumed to know and to intend them to be such. This is very illogical. We have seen that the fact which makes a contract in the form of a sale a cover for a wager, is a contemporaneous agreement that the sale is not to be enforced. There are two expressions in the statement of the court which show that there was no such agreement. He says that the trades are to be settled by rings and

counter trades "*when it is possible*" to do so. It follows that it may not be possible to so settle them, and, as we shall see in Chapter V, Rule I, the mere liability that performance may be required proves that the contracts are valid. He also says that "most of their trades are settled in that manner, without *actual delivery or receipt* of the commodity bought or sold." But we shall see in the section on symbolical delivery that actual manual delivery is not necessary. In every ringing out and settlement through a clearing-house there is a symbolical delivery, or, at least, what is equivalent to it. And even admitting that McCurdy was accurate in his statement that "millions of bushels of corn are bought or sold in option trades where no delivery is made," it does not follow that the contracts in their inception were fictitious. That many contracts are settled there can be no dispute about, but it is paradoxical to say that they are settled without *any* delivery when they are settled by rings and through clearing-houses. It is *more* accurate to say that the contracts are performed, as precisely the same result is attained. If we should consider, however, that they are settled without delivery that would not make them invalid, as we shall see when we come to consider the subject of subsequent settlements.

In the case of Irwin *v.* Williar,[1] it appeared that Williar & Davis were commission merchants in Baltimore, and executed in the Baltimore Corn and Flour Exchange certain orders for future delivery for the account of Irwin & Davis. At or before maturity these contracts of sales were settled by Williar according to the customs of the Corn and Flour

[1] 110 U. S. 499.

Exchange, through the members of which substantially all the buying and selling was done. It appeared that the general usages and customs obtaining at Baltimore among grain commission merchants were the following, which were well known and had long existed, and had been uniformly observed among the members of the said Corn and Flour Exchange, and others engaged in buying and selling grain on commission, at said city, viz.: First, that a commission merchant buying or selling grain upon the order of a customer for future delivery entered into such contracts in his own name, thereby becoming personally responsible to the party with whom he contracted for the performance of the contract, the name of the principal being never, or but rarely, disclosed: Second, that such commission merchant held himself and stood responsible to his principal or customer for the performance by the other party with whom he entered into such contracts, and for making good the contracts to his principal in case of the insolvency or default from any cause of such other party: Third, that when it so occurs that a commission merchant, upon the order of the customer, has sold to (or *vice versa* purchased from) another commission merchant grain for a certain future delivery, and afterwards, upon the order of another customer, buys (or *vice versa* sells) a like amount of like grain for the same future delivery, from (or to) the same commission merchant, the two commission merchants as between themselves set off one contract against the other and mutually surrender or cancel them, settling between them the difference in price, each substituting on his books in the place and stead of the other the new or

second customer, upon whose order he made his second purchase or sale: Fourth, that where such transaction is not with the same commission merchant with whom the first was made, but a different one, and it is found that a circuit of like contracts exists, by which the commission merchant A. has sold grain to B., who has sold like grain to C., who has made like sale to A., the commission merchants settle, as among themselves, by what is called a "ring." The parties in such case do not make successive deliveries until the grain comes round again to the commission merchant from whom it started, nor does each buyer pay the full amount of the purchase-money to his immediate seller, but receives or pays, as the case may be, the amount of the net profit which he would have received or of the net loss which he would have sustained, if the settlement had not been by a "ring." The settlement of differences made by Williar on account of Irwin & Davis were made in pursuance of these customs. The learned judge, who tried the case in the court below, in charging the jury, said: "The evidence further tends to show a custom obtaining among commission merchants at Baltimore to the further effect that, though the second transaction may have been had with a different commission merchant from the one with whom the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain, for like delivery, so that the seller owes the wheat to the buyer to whom he sold, and he to another, who owes like wheat for like delivery to the first commission merchant, that then, in such case, they settle by what they call a 'ring,' that is, they all reciprocally surrender or cancel their contracts, adjust the price

differences between themselves, and surrender all margins that had been put up; that in all such cases the commissiom merchant substitutes the contract of another customer in place of that with the commission merchant whose contract had been canceled or surrendered, and that he guaranties to his customer the performance of the contract originally made on his behalf. I say to you, gentlemen, that these customs are founded in commercial convenience; that they are not in contravention of law, and that they are valid." In the Supreme Court this instruction was held to have been error, not on the ground that these customs tended in any way to show that the transactions were wagers, but because they worked a substantial and material change in the principal's rights and the obligations of third parties to him, and that they could not be binding upon the principal without his assent; and after remarking that there was no evidence in the case to show that Irwin & Davis had any knowledge of these customs, the court said: "The relation between the parties to this litigation was that of principal and agent; and the defendants in error, acting as brokers, in executing the orders to sell, undertook to obtain, and, as they have alleged in their declaration, did obtain a responsible purchaser; so that the plaintiff in error would, upon the contract of sale against such purchaser when disclosed, have been entitled to maintain an action in case of default in his own name. Although the broker guaranteed the sale, it was not a sale to himself; for, being agent to sell, he could not make himself the purchaser. The precise effect, therefore, of the custom proved was, that at the time of settlement, in anticipation of the maturity of the contracts,

the brokers, by an arrangement between themselves, by a process of mutual cancellation, reduced the settlement to a payment of differences, exchanging contracts, so as to substitute new purchasers and new sellers respectively for the balances. The question is not whether, in a given case, without assent, express or implied, of the principal, this change of his rights and obligations can be effected (for that proposition is not doubtful), but whether the fact of his transacting business through a member of the exchange, without other knowledge of the custom, makes it part of his contract with the broker." The court decided the question in the negative; but the case, both in the Circuit Court and in the Supreme Court, is an authority strongly in favor of the custom of making rings, when considered in reference to wagers. Indeed, in the latter court, the court said that "if the principals knew of the custom it would be lawful."

SYMBOLICAL DELIVERY—CLEARING-HOUSES.

The method of making deliveries in the New York Cotton Exchange, where cotton is sold for future delivery, is described in Sawyer *v.* Taggart.[1] "Rules of the exchange, made part of the contracts, respectively provide, that deliveries of cotton sold for future delivery shall be made in the following manner: the seller shall give written notice to the buyer that he will deliver on a named day. If the seller has resold the goods, he passes the notice to his vendee, and so on until it reaches a vendee who has not sold. The

[1] 14 Bush, 727.

seller must then deliver to the buyer a transferable order, or an order on a warehouse or place of delivery before 12 M. of the day preceding that on which the delivery is due. If the buyer has not resold, he is bound to present the order and receive and pay for the goods. If he has sold, he passes the order to his vendee, and so on until it reaches a vendee who has not sold, and he is bound to receive and pay for the goods at the original contract price, the difference between that price and the price of each subsequent sale, being settled between the immediate parties to such sales. The rules also provide that delivery orders shall be received by any member of the exchange to whom goods of the kind called for in it are due from another member. The evidence shows that in every instance notice of delivery and the usual delivery orders, were received by Sawyer, Wallace & Co. from the seller, and where passed by them to those to whom they had sold for account of Hamiltons. Having been shown that they entered into contracts valid on their face for the purchase of the goods they were directed to buy for Hamiltons, and that, pursuant to direction, they resold the goods and delivered to the purchasers from them the delivery-orders which they had received, and that on such resales there were losses, which they paid, they have made out a clear *prima facie* right to recover." A similar system prevails in the New York Produce Exchange, Chicago Board of Trade, and other exchanges. In the Consolidated Stock and Petroleum Exchange of New York, the by-laws provide for the delivery of oil by the certificates of the United Pipe Lines. These warehouse orders and oil certificates entitle the holder to the delivery of the articles men-

tioned in them, and have acquired in the market the same value as the articles themselves, and without them it would be impossible to do the enormous business that is done in large cities.

In the Consolidated Stock and Petroleum Exchange of New York, there is a regularly organized clearing system in successful operation. All deliveries are made through the clearing-house, which is a sort of great pool into and from which all deliveries are made. An arrangement is made with the American Loan and Trust Co. and the exchange by which the former agrees to adjust and clear the mutual accounts of the members of the exchange, in consideration of a small commission paid by each broker to the trust company. The brokers make their contracts with each other, and in them it is agreed that deliveries shall be made through the clearing-house. At the end of each day the accounts are balanced by the trust company, and if a broker has bought more oil than he has sold, he receives pipe-line certificates from the clearing-house for the difference, and pays for them. If he has sold more than he has bought, he delivers pipe-line certificates to the clearing-house, and receives the money for them. If he has bought and sold an equal amount of oil at different prices, he pays or receives the difference, as the case may be. If the oil is sold for future delivery, at the option of one party as to the time of delivery between certain days, the option is exercised by giving notice of readiness to deliver or receive, as the case may be. The oil must then be delivered the following day through the clearing-house. If no notice is given, then the delivery must take place through the clearing-house on the last

day of the time limited in the contract. In this manner the delivery of the oil certificates is made by and through the clearing-house, and as the business of hundreds is united in one person—the clearing-house—many actual transfers of certificates are avoided, and the oil they represent remains undisturbed in the tanks. Thus the paradoxical statement may be made, that millions of barrels of oil are sold and actually delivered each day without a drop of oil changing place. Stock transactions are cleared in the same manner. Similar systems are used in other exchanges.

In precisely the same manner the banks of New York city clear their mutual claims upon each other. An association has been formed by the banks, under the name of the New York Clearing-house, and each morning their representatives assemble together at 10 o'clock at No. 14 Pine street. Each bank has a list of its checks and drafts on the others, and mutual deliveries are made under the direction of officers of the association. After the delivery has been completed, the accounts of each bank are adjusted by the association, and if any given bank has delivered in checks or drafts an amount greater than it has received, the association pays the difference; or if, on the other hand, the bank has received more than it delivered, the bank pays the association the difference. Formerly the banks cleared their accounts over each other's counters, delivering every day, each to the other, their mutual drafts, and settling the differences in money once a week. By means of the clearing-house, accounts representing millions of dollars are daily adjusted without the use of any money except the differences. Checks and drafts in bank clearing-

houses correspond with the contracts in the petroleum exchange, one being simply to pay money, and the other to deliver oil or stock certificates.

"An important extension of the clearing-house principle was effected by the establishment in 1874 of the London Stock Exchange Clearing-house, which undertakes to clear, not sums of money, but quantities of stock. As stock-brokers settle their transactions only once a fortnight, or in consols once a month, it naturally arises that in the intervals the same broker will usually have bought the same kind of stock for one client and sold it for another. The very same stock may have passed through several different hands, and the same brokers may have had reciprocal dealings with each other. Instead, then, of actually making transfers of stock for each transaction and paying by checks, which greatly swell the business of the Lombard Street Clearing-house on settling days, a plan has been formed, according to which each member of the clearing-house prepares a statement of the net amount of each stock which he is to receive from or deliver to each other member. The manager of the house, after verifying these accounts, which should balance in the aggregate, directs the debtor members to transfer quantities of stock to the creditor members in such a way as to close all the transactions. It will be noticed for pretty obvious reasons the transfers are made in stock exchanges directly from broker to broker, and not to the manager of the clearing-house, as in banking transactions. A separate clearing has of course to be made in each kind of stock. It is found that the quantities actually transferred do not exceed ten per cent. of the

whole transactions cleared, and the checks drawn are diminished on settling days as much as ten millions sterling."[1]

"Formerly the London bankers used to exchange checks and settle accounts by a daily meeting of their clerks at one of the banks; but in 1875 a building now called the clearing-house, in Lombard street, was secured for the purpose. The arrangements are conducted by a committee appointed by the banks. There are two paid managers or inspectors. During the day each house transmits the checks and bills which it receives on the others and keeps a note of the obligations coming against itself. Accounts are closed at four o'clock. The bills and checks are classified at the clearing-house, and at half-past five the accounts are adjusted, each bank paying or receiving the balance due by or to it. * * * Thus transactions involving millions of pounds are settled without the intervention of a sovereign or bank bill."[2] So in England, Ireland, and this country, there are ingeniously devised institutions by which the mutual accounts between railroads are unravelled, balances struck, and paid to or by each company as the case may be.

It will thus be seen that the clearing-houses upon the exchanges work precisely in the same way as those of the banks and railroads. They all deal in differences only. What effect can the fact that the accounts of the members of an exchange may be and are cleared in this way have in determining whether a given purchase or sale is a wager on the market price or not? It may be

[1] Jevon's Money and the Mechanism of Exchange, 281, 282.

[2] Student's Encyclopædia.

admitted that the system gives unlimited opportunities for speculation. To those who think that is an evil, it must be a matter of regret; but upon the question of wager the fact of clearing a contract is a demonstration that it was *bona fide*, for otherwise what use would there be in clearing it, even if it would be possible to do so. It stands to reason that two persons who had made a bet on the price of a commodity, would not put it, if they could, where they might be compelled to execute it or have it offset as a purchase or sale.

Perhaps there is no place in this country where so much wild and reckless speculation is carried on as in the Petroleum Exchange of New York; fluctuations of five and ten cents per gallon being of frequent daily occurrence. Yet the laws of that corporation positively forbid fictitious sales, and render parties concerned in them liable to suspension and expulsion. And so in the New York Stock Exchange, whose doors have been as a snare to so many, its laws provide "that no fictitious sales shall be made, and members contravening this law shall be expelled." And so in the New York Cotton Exchange, the laws of that institution provide that "all contracts for the future delivery of cotton shall be binding upon members, and of full force and effect until the quantity and qualities of cotton specified in such contract shall have been delivered, and the price specified in said contract shall have been paid. Nor shall any contract be entered into with any stipulation or understanding between the parties, at the time of making such contract, that the terms of said contract as specified in section 73 of the by-laws are not to be fulfilled, and the cotton delivered and received in accordance with said sec-

tion." Yet the laws of the Petroleum Exchange require its members to settle through the clearing-house, and the laws of the Cotton Exchange compel parties to "ring out" their contracts and in some stock exchanges clearing-houses are established by law, and settlements through them made compulsory. It is hardly to be supposed that the exchanges would make rules of procedure which would subject the entire membership to expulsion.

The subject of symbolical delivery has received some attention in the courts. The method of delivery by warehouse receipts pursued in the New York Cotton Exchange was approved in Sawyer *v.* Taggart.[1]

In Gregory *v.* Wendell,[2] the court said: "Courts must, however, from necessity recognize the methods of conducting and carrying on business at the present day, and, applying well settled principles of the common law, enforce what might be called a new class or kind of agreements, heretofore unknown, unless they violate some rule of public policy. The mercantile business of the present day could no longer be successfully carried on if merchants and dealers were unable to purchase or sell that which as to them had no actual or potential existence. A dealer has a clear right to sell and agree to deliver at some future time that which he has not, but expects to go into the market and buy. It is equally clear that the parties may mutually agree that there need not be a present delivery of the goods, but that such delivery may take place at some other time; and that there need not be an actual manual possession given, but a symbolical one, as by the de-

[1] 14 Bush, 727.

[2] 39 Mich. 337.

livery of warehouse receipts according to custom, is also beyond dispute. In these cases there is something actual and tangible sold, although not then owned or possessed by the vendor, or rather something actual or tangible agreed to be sold, as the agreement is more in the form of a contract for a future sale. There is also an intention, and such is the agreement, that when the time agreed upon for delivery arrives the property shall be actually delivered."

In Wall *v.* Schneider,[1] an action based upon a contract for the future delivery of warehouse receipts for wheat was sustained.

Rings are temporary clearing-houses, and it may be fairly said that symbolical delivery takes place between the parties.

In Dickson *v.* Thomas,[2] the plaintiff was a member of the Philadelphia Board of Brokers, and brought his action to recover a balance claimed to be due from the defendant's testator for stock speculations conducted for the testator's account. It was claimed that the transactions were wagers. The plaintiff has a verdict in the court below, but on appeal Justice Gordon, in delivering the opinion of the appellate court, said: "An inspection of the evidence of the plaintiff will, of itself, reveal the fact that there was a mistrial of this case in the court below. Thomas swears that he sold for Dickson five hundred shares Pennsylvania stock, short, fifteen days, buyer's option. This means, of course, that Dickson has no such stock, and so it was further on explained by saying that at the time he professed to sell the stock, he had no such stock in his hands to sell. Nevertheless, he says, when he sold

[1] 17 Reporter, 700.
[2] 97 Pa. St. 278.

these five hundred shares, he delivered them. This anomalous kind of testimony he explained by saying that this delivery was made on the clearing-house sheet, which means a mere settlement of differences. It appears also, from this same testimony, that in order properly to keep up appearances, when the time came for delivery, he had to borrow five hundred shares of stock from somebody whose name does not appear, and that of these there was no actual delivery, but, as the witness says, it came through the clearing-house sheet. All this means, in common parlance, that Thomas sold for Dickson five hundred shares of stock, which Dickson at that time neither had nor intended to have, and that, under the pretence of meeting this contract when it fell due, Thomas pretended to borrow five hundred shares, which were not delivered to him; that this altogether fictitious transaction was accomplished through the agency of the clearing-house, and was one in which no other parties were known but Thomas and Dickson, who were to account to each other for differences only. Confessedly, then, this was a dealing in differences or margins, a wagering contract, and therefore utterly void. There was here no question as to a *bona fide* time contract, upon which the jury were called to pass."

This case has been criticised in many places in this book, and by judges and law writers, but upon no point is it more open to it than in its reference to the clearing-house of the Philadelphia Board of Brokers. As has been before stated, the fact that the accounts were settled through the clearing-house, proves that the transactions were *bona fide*. If fictitious they could not have been put through the clearing-house.

MORE SALES THAN GOODS IN THE MARKET.

In Sawyer *v.* Taggart,[1] the court said: "Another matter relied upon is the fact that it often happens that contracts are entered into in one month on the New York Cotton Exchange for the sale of a greater number of bales of cotton than are in all the ports of the United States. This argument is not sound. As already seen, sales for future delivery are legal, and one who has purchased for future delivery may resell. In this way the same bale of cotton may be sold many times in one month, and thus the aggregate of sales may greatly exceed the stock on hand or in the country, and yet all the contracts may be not only legal, but may in fact be performed."

Precisely in the same way a ton of coal would figure in the market as many tons by the changes of possession from the time it leaves the mine until it reaches the consumer. So with any other article of commerce. Plain as this proposition is, it is one of the commonest points relied upon in arguments before juries to show that business on the exchanges is unlawful. It arises either from ignorance of the methods of business pursued there, or from a dishonest desire to work upon the prejudices of juries.

In Beveridge *v.* Hewitt,[2] the fact that more pork is often bought and sold every day than there is in Chicago, was one of the facts relied upon by the court in determining that the parties were dealing in the options prohibited by the Illinois statute.

[1] 14 Bush, 727.
[2] 6 Bradw. 497.

SUBSEQUENT SETTLEMENT OF CONTRACTS.

If the contracts were originally valid, no subsequent settlement of them can make them void.

Clarke *v.* Foss[1] was a suit in equity begun by the assignee of C. B. Stevens & Sons, bankrupts, to set aside and cancel certain promissory notes and a mortgage upon real estate to secure notes executed by C. B. Stevens & Sons to the defendants, on the ground that they were void as being given to secure a consideration arising out of certain option contracts for the sale and delivery of grain, which it was claimed were wagering contracts. It was claimed on the other hand, that if the contracts were valid in their inception, and not tainted with any gambling intent or device, a subsequent settlement by the parties by payment of differences, instead of by actual delivery, cannot make them void for illegality. The court said: "When these contracts matured, the defendants performed them by a delivery of the grain, except when, by the mutual arrangement of the parties concerned, the contracts were taken up and cancelled, and then they invariably paid in cash the damages which the law obliged them to pay upon a failure to perform their agreement; that is to say, the difference between the contract price and the market price on the day when delivery should have been made. Now, in the absence of more convincing testimony, what the parties actually did is pretty good evidence of what they intended to do; and I must conclude that upon the face of the transaction, as shown by the acts and conduct of the parties, the evidence is very strong that these sales

[1] 7 Biss. 540.

were *bona fide* sales, and not made with any intent, mutual between the parties, to violate the law. It must be incontestable, that if the contracts were valid in their inception, and not tainted with any gambling intent or device, a subsequent mutual settlement by the parties, which takes the place of actual performance, cannot have the retroactive effect of making them void for illegality. If the contracts were void at all, they must have been void when made. The subsequent conduct of the parties may, and should be considered as evidence tending to show what the real contracts were when entered into; but if they were originally valid, no subsequent act can have the effect to render them obnoxious to the taint of illegality as being gambling contracts."

The case of Sawyer *v.* Taggart[1] involved the question of the legality of cotton futures made by the plaintiffs in the New York Cotton Exchange for the benefit of Hamilton Bros. & Co., and the defense was made that the contracts were wagers. Upon the point we are now considering, the court said: "We may here remark that there is no evidence that the sellers did not in fact make actual delivery in each of these contracts to those to whom sales had been made, or that any of the contracts were settled by the payment of differences. But it is immaterial how they may have been settled. If they were entered into without any mutual agreement, tacit or expressed, that they were not to be performed by delivery of the goods and payment of the price, they were valid, and no subsequent agreement to settle them by the payment of differences could render them invalid."

[1] 14 Bush, 727.

In Gilbert *v.* Gauger,[1] it was held that if one makes a contract to deliver grain during a future month at a fixed price, and by reason of the adverse aspect of the market directs his broker to settle with the purchasers before maturity of the contract, this does not make the contract void as a gambling transaction; and he is liable for the differences paid by the broker in his behalf as well as for his commissions.

In Fareira *v.* Gabell,[2] the court said: "Let us suppose that A. agreed with B. to buy a thousand bushels of wheat, at $2 per bushel, to be delivered and paid for at the end of thirty days. If wheat rises in value, A. will be the gainer, and if it goes lower he will lose; but inasmuch as the apparent object of the contract is an actual purchase of the wheat, it is not a gaming contract. Nor could such a contract be justly regarded as a wager, although when the time for the delivery of the wheat arrived, it was agreed that B. should, instead of forwarding the wheat to A., pay him the damages to which he would be legally entitled for the refusal to deliver; that is to say, the difference between the stipulated price and the actual value of the wheat at the time fixed for the fulfillment of the contract. Such a settlement of the differences would not, if there was nothing more, be a sufficient ground for inference that the contract was a gambling contract, or contrary to law."

In Melchert *v.* Western Union Telegraph Co.,[3] the court said: "The question is, what was the intention of the parties in the inception of the contract? For if, in its inception, the contract was *bona fide*—and if

[1] 8 Biss. 214.
[2] 89 Pa. St. 89.
[3] 11 Fed. Rep. 193.

it was the true intent of the parties that the property should be in fact delivered—it can be no valid objection that they afterwards, at the time of delivery, arranged the transaction between them by the payment of the difference between the contract and the market prices. Nevertheless, the subsequent conduct of the parties in dealing with the contract—in adjusting, settling, or fulfilling it—may often, as evidence, cast strong reflected light upon their original intention in making it. * * * But was the rye delivered or intended to be delivered by either party, or was it their understanding that their respective contracts should be settled and satisfied by the payment of differences? How can we judge of their intentions except by considering what they actually did in adjusting their contracts? Is it not just to conclude, in the absence of proof to the contrary, that the parties to a contract adjust it according to their understanding of their intentions in making it?"

In Williams *v.* Tiedman,[1] the court, in speaking of contracts for future delivery, said: "It may sometimes happen that when the time arrives for performance, the seller, not having the goods on hand, finds that he must pay a higher price for them than that which his vendee has agreed to pay. The vendee, although entitled to actual delivery, is willing to waive it, provided he can realize the same mercantile benefit that would accrue from the receipt of the goods and a sale at the market price. This may be effected by a settlement of differences with his vendor, who then pays him the amount of the net rise, instead of procuring and turning over the property. In like manner, if there has

[1] 6 Mo. App. 269.

been a fall in the market price, the seller may realize, on a settlement of differences, all the mercantile advantage which would result from a purchase at the reduced price and a delivery to his vendor at the price agreed upon. In either of these transactions no taint is thrown upon the original contract, which contemplated actual transfer and delivery. The actual delivery may still be insisted upon by either party, but is dispensed with, in the convenience of both."

In Kent *v.* Miltenberger,[1] the court, in speaking of contracts for future delivery, said: "All the decisions unite upon the proposition that these contracts are presumptively valid, but that, though valid on their face, they may be shown by extrinsic evidence to have been intended by the contracting parties, not as a commercial transaction, but as a mere wager on the future state of the market; that the one thing which makes them wagers and renders them invalid is an agreement between the contracting parties, made at the time of the contract and understood as part thereof, that the contract may be discharged by the seller, not by the delivery of the commodity sold, but by paying the purchaser the difference between the market price on the last day of the performance of the contract and the price at which the sale was made; or, on the other hand, that the purchaser, if the market goes the other way, shall not be bound to receive the commodity purchased, but may settle by the payment of differences. And that such an agreement will not, if made subsequently to the making of the contract itself, taint the contract or render it invalid in law."

If it is customary for parties to settle their con-

[1] 13 Mo. App. 503.

tracts by the payment of differences, this would be strong evidence of their original intention to do so.

In Bryant *v.* Western Union Telegraph Co.,[1] it was said, in speaking of "bucket shop" business: "It is perhaps true that if a customer keeps his margin good, so that he cannot be closed out, and does not exercise his right to settle upon the basis of the differences in the price of grain, etc., he can demand compliance with the contract and a delivery, but if the course of business between the complainants and their customers is to settle their alleged contracts by the payment of the difference in the market rates, the fact that a customer may, under certain circumstances, require an actual delivery, does not relieve the complainants from the charge of carrying on a bucket shop. It is the general course of a man's business which defines and classifies it." This case was cited with approval in Whitesides *v.* Hunt.[2]

That a large number of contracts are settled on the exchanges does not tend to prove that any given contract was intended to be so settled.

In Roundtree *v.* Smith,[3] Miller, J., said: "Evidence was given that a very large proportion of all the contracts made for the sale of produce at the Board of Trade of Chicago, was settled by the payment of differences, and that nothing else was expected by the parties to them, and the number of these in proportion to the number of *bona fide* contracts, in which delivery was expected and desired, is said to be so large as to justify the inference that it was so in these

[1] 17 Fed. Rep. 825; see full statement of this case on page 33.

[2] 97 Ind. 191.

[3] 108 U. S. 269.

cases. But since the plaintiff testifies that he had no such understanding, since nothing is proved of the intention of the other parties, and since the contracts were always in writing, we do not think the evidence of what other people intended by other contracts of a similar character, however numerous, is sufficient of itself to prove that the parties to these contracts intended to violate the law, or to justify a jury in making such a presumption."

And in Sawyer *v.* Taggart,[1] it was said: "It is contended that it has been proved, and it may be conceded, that a large proportion of similar contracts is in fact so settled. But it is equally proved that a very large business is done on similar contracts by dealers, manufacturers, and shippers who receive and pay for the goods. Nearly the entire business in what are called futures is carried on in the exchanges, of which nearly all large dealers are members. The exchanges are corporations created and recognized by the laws of the State of New York. It is not even claimed that there is not much legitimate business done on 'change. The transactions for Hamiltons were conducted in a similar manner in which all legitimate transactions there are conducted, and the fact that they were entered into there has no greater tendency to prove that they are illegal than the same fact has to prove all other transactions there are also illegal."

Where it provides in a contract, that upon its breach the measure of damages shall be the difference between the contract and market price at the time of the breach, this does not invalidate the contract.

[1] 14 Bush, 727.

In Wall *v.* Schneider,[1] the action was brought for the breach of a contract for the future delivery of barley by warehouse receipts, and, as a part of the contract, it was agreed that it should be subject to the rules and regulations of the Chamber of Commerce of Milwaukee. The court said: "True, the rule provides in effect that in case of a default of either party, such party shall be liable to the other for the difference between the contract price and the price at which the property has been sold or bought, as the case may be; but that is only so as a consequence of a breach, and in order in that event to constitute and fix the rule and measure of damages against the party so in default. But such could only be the result in case of default. In the absence of such default, and in case of performance by both parties, no such consequence could occur. Of course the power to make contracts implies the power to break contracts. A necessary incident of breaking a contract is liability to the other party for the breach. The amount of damages must necessarily depend upon the nature of the contract and the extent of the breach. In an executory sale of a commodity having a fluctuating market value the amount of the damage must necessarily depend upon the state of the market at the time of the breach. Is the contract in question to be condemned as illegal merely because it provided in effect that in case it should be broken by either party the measure of damages should be the difference between the contract price and the price in the Chamber of Commerce at the time of the breach? Assuming that such price on the Chamber of Com-

[1] 17 Rep. 700.

merce at the time of such breach would be the market value, then it is manifest that the amount of damages thus stipulated for was precisely the measure of damages which the law would give on such breach without any stipulation."

CONTRA TRANSACTIONS.

In Thacker *v.* Hardy,[1] the defendant employed the plaintiff, a stock-broker, to speculate for him on the London Stock Exchange. The defendant knew that for the purpose of carrying out his transactions the plaintiff would have to enter into contracts in his own name to buy or sell stocks or shares, and in order to protect himself and the defendant, would have to enter into other contracts to buy or sell respectively. The plaintiff knew that the defendant never expected or intended to accept actual delivery of the stocks and shares which the plaintiff might buy for him, nor actually to deliver the stocks or shares that plaintiff might sell for him. The defendant nevertheless knew that he incurred the risk of having to accept or deliver, as the case might be, but was content to run that risk in the expectation and hope that the plaintiff would arrange matters so as to render nothing but differences payable to or by him; and that unless that arrangement was made the defendant was, to the knowledge of the plaintiff, wholly unable to pay for or deliver the stocks or shares bought or sold. The action was brought against the defendant for the plaintiff's commissions and indemnity against the liability incurred by the

[1] 27 Weekly Reporter, 158; s. c. L. R. 4 Q. B. D. 685.

plaintiff on the Stock Exchange, and he was allowed to recover. Bramwell, J., went so far as to say: "I will suppose that the principal would have a right to say to the broker, 'the transaction you have entered into is for a purchase, and accordingly I am bound to receive the stock and pay for it; but I call on you by virtue of the bargain you and I made when I employed you to sell that stock for me, so that, instead of my taking and paying for it, I shall only have to take or pay the difference.' In my opinion there is nothing in that transaction within the gaming or wagering act, for it is quite clear that even in a bargain like that, the principal would have the right to say, 'I will not go on with these speculations, but I will take the article purchased and hold it as an investment.' I have no doubt that that does continually happen, and that men who have bought with the hope of a rise, intending to sell again, but have met with a fall, have been so disgusted at having to end the matter by reselling, or continuing it on by paying continuations or backwardations, as the case might be, that they have under such circumstances found the money, and taken the stock, and paid for it, and so in that case the transaction comes to this, that the principal has a right to say, 'well, I will take the stock I have bought' (if it was a purchase), or 'deliver the stock I have sold' (if it was a sale); or a right to say, 'you must try to end the transaction by buying or selling grain.' I say 'try,' for the broker might be unable to do so, and all that he would be bound to do would be to endeavor to buy or sell again. What is there illegal in that? I employ you to buy, with the right to call upon you to sell, if it does not suit me to

take the article. What gambling or wagering is there between a broker or jobber in that case? Absolutely none. The broker can say, 'it does not matter to me if the thing goes up or down;' but in the case of wagering as to the price of stock it does matter to him."

In marked contrast to this appears the case of Beveridge *v.* Hewitt.[1] In this case the legality of certain transactions on the Chicago Board of Trade were under consideration. The action was in equity to set aside a judgment recovered on a claim which grew out of and was the result of certain unlawful and gambling transactions carried on in the Chicago Board of Trade by Hewitt, Bliss & Co., as the agents and brokers of one McCurdy. It appeared that Hewitt, Bliss & Co. commenced dealing for McCurdy, in January, 1879, and between that date and some time in April following they took and closed forty-four different deals. These deals were all, in form, contracts for the purchase and sale of wheat, pork, and lard for future delivery. In every instance the deal was closed out by a counter contract in the form of a purchase or sale of the same commodity for the same delivery. The court, after commenting upon certain facts tending to give a wagering character to the transactions, said: "But perhaps the most significant proof on this subject is to be derived from the manner in which the business itself was conducted. Forty-four different purchases were made, also the same number of sales, yet no property was delivered or offered to be delivered. Instead of this, every deal was closed out long before the time of delivery arrived by a counter purchase or sale. This was sometimes done on the very day the

[1] 8 Bradw. 467.

contract was made, and usually within a very few days thereafter. * * * The inevitable conclusion is, that these transactions, so far as they purported or pretended to be actual purchases or sales of property, were merely fictitious; that there was no *bona fide* intention or expectation on the part of either purchaser or seller to deliver or receive the commodities purchased or sold; but under the guise of transactions legal in form, the parties were really dealing in options, to be ultimately settled on the basis of the differences in price."

This latter case is not a high authority, but it is a good illustration of the want of accurate knowledge of the methods of doing business on the exchanges. Really the fact that a purchase or sale is closed by a *contra* transaction, is the best possible proof that the first one was *bona fide*. To illustrate: A speculator gives an order to his broker, a member of the exchange, to buy for him grain for future delivery in a subsequent month. Before the time for delivery arrives the price advances, and having made a satisfactory profit he directs his broker to sell. The broker then does not sell the actual grain represented by his contract, because he has not bought any specific grain; he has made a contract for the delivery to him of the quantity and quality of grain specified at the time mentioned. The way he executes the order to sell, is to make another contract of sale, usually with another person, for a like quantity and quality of grain to be delivered by him at the same time. The broker then settles with his customer, paying to him the difference between the price named in the purchasing and selling contracts less his commissions, but in both instances he

must himself perform the two contracts which he has made for his principals' account. The latter contract is often spoken of as a "cover." A person being, for instance, short of the market directs his broker or commission merchant to "cover" his shorts; and by this he means to make a contract for the purchase of the same commodity for the same delivery, thus letting one contract "cover" the other. It would be possible in closing out transactions of this character to make an assignment of the original contract; but it would be impracticable in most instances to do so. Members of the exchange, in the hurry of business, will make contracts with members offering to make them where they would not take an assignment. The practical result to the principal, however, is the same. Where the party is speculating it is the almost invariable custom to close out purchases or sales for future delivery by these *contra* contracts. If the transaction was a wager, why should there be any second or counter transaction? Having fixed the price by the pretended contract, the difference would be found by comparing it with the market price at the time mentioned for the pretended delivery, and there would be no need of a second contract. The fact that the second transaction is made is a demonstration that the first was *bona fide.*

It is to be observed that in these cases the actions were brought by commission merchants to recover for losses paid on account of their principals. If, however, *contra* transactions were made between principals there would be reason for thinking that they were, taking them altogether, wagers. This would be especially so where there had been a long continued course of business of that character. It is true that

the relation of principal and agent may be a cover for a gambling intention, and in such cases *contra* transactions might be a part of the cover. A good illustration of this is to be seen in the cases of Byers *v.* Beattie.[1] In this case, however, no question whatever was raised as to the legality of the contracts of purchase and sale of stock made by the plaintiff.

In the case of Beveridge *v.* Hewitt, the court falls into the error of considering the contracts of purchase and sale made by the agent for his principal as though they were made by the agent with his principal.[2]

TRANSFERS BEFORE THE TIME OF DELIVERY ARRIVED—NO GRAIN OFFERED OR DEMANDED—CONTRACTS CLOSED THE SAME DAY—NO DEAL LASTING THROUGH OPTION—NO PREPARATION FOR DELIVERY MADE—COVERS.

In Beveridge *v.* Hewitt,[3] the court, in considering the intention of the parties to contracts for future delivery of grain, pork, and other commodities, made by a broker on the Chicago Board of Trade, said: "These brokers, in a little over a month and a half, purchased property amounting in value to over $200,000. None of it was for earlier than March delivery, and as the first purchase was made January 9, and the last March 29, the time for delivery had expired as to none when the last contract was made. It thus appears that all the purchases were concurrent, and had all been carried to the last day of delivery,

[1] See Chap. V, Rule IV. See also Bryant *v.* Western Union Tel. Co. *ante,* p. 33.

[2] This is a common error. See passage in Chapter V.

[3] 8 Bradw. 467.

McCurdy, for the last three days of March, would have had on hand contracts for the purchase of this entire amount of property. To believe that either he or Hewitt, Bliss & Co. had any expectation or intention when these contracts were made, that the grain purchased should be delivered or received, would require a stretch of credulity, of which no man of common understanding would be guilty."

In Lyon *v.* Culbertson,[1] the court said in reference to like contracts: "The fact that no wheat was offered or demanded, shows, we think, that neither party expected the delivery of any wheat, but, in case of default in keeping margins good, or even at the time of delivery, they only expected to settle the contract on the basis of differences, without performing or offering to perform his part of the agreement." This case was cited upon this point with approval in Whitesides *v.* Hunt.[2] In Colderwood *v.* McCrea,[3] the court said: "The exhibits show that the numerous deals between these parties, with one or two exceptions, were all settled upon differences, without the delivery of a bushel of grain or a barrel of pork, and without the payment or reception of any money for the goods purported to have been bought or sold; and in no instance does it appear that Colderwood was even called upon to receive grain purchased, and pay for it. The deals were all in form purchases and sales for future delivery, mostly to be delivered in the following month, or in the month next succeeding." And this with other things led the court to say: "One can hardly fail to perceive very clear indications that the

[1] 63 Ill. 33.
[2] 97 Ind. 191.
[3] 11 Bradw. 543.

entire line of dealings were simply dealings in differences, with no intention to deliver or receive, and pay for the commodities which were the subject of the deals."

In Beveridge *v.* Hewitt,[1] the court, as tending to show that the contracts for the sale of grain, pork, and other commodities made by a broker on the Chicago Board of Trade were wagers, said: "These various deals amounted in the aggregate to the sale of property of the value of over $200,000, and the purchase of the same amount of property. In a number of instances the sale took place on the very day of the purchase; in others, two or three days intervening, and in every case the deal was closed out long before the seller would have a right by the terms of the contract to tender the commodities sold. * * * Every deal was closed out long before the period of delivery arrived, by a counter purchase or sale. This was sometimes done on the very day the contract was made, and usually within very few days thereafter." And concerning like contracts, and for like purposes, the court, in Colderwood *v.* McCrea,[2] says: "The contracts were usually settled within a few days after the commencement of the deal, and in some instances on the same day. It happened more frequently than otherwise that Colderwood sold the grain before he had bought it; and we find no instance in which the deal lasted during the lifetime of the option."

In Melchert *v.* American Union Telegraph Co.,[3] in considering the intention of the parties to a sale of rye for future delivery, the court said: "We must

[1] 8 Bradw. 467.
[2] 11 Bradw. 543.
[3] 11 Fed. Rep. 193.

look at the action of interested or accused parties, rather than to their mere words, to ascertain their real intention. We must consider what they have done, rather than what they have said, when called to account for their actions. We can best learn what interpretation the parties themselves have put upon their own contract, by considering what they have done under, and in pursuance of it, with a view to its settlement or fulfillment. Considered in this view do we find that plaintiff, after having sold 15,000 bushels of rye for September delivery, made any preparation whatever, prior to September 8th, for the purchase of rye, either in the country or upon the Board of Trade? None whatever. But it is equally evident, that, when on the 8th of September rye had advanced to 80 cents, and the plaintiff made up his mind to protect himself, he furnished no money to his factor to purchase rye in store. But he instructed his agent to 'cover rye,' and to do it 'immediately.' What did he mean by this? Could he have supposed for a single moment that this factor would, without any arrangement whatever, advance $12,500 to purchase rye for actual delivery? If it was his understanding of the contract that it called for actual delivery, why did he not, seeing that rye had advanced from 65½ to 80 cents, and was still rising, remit money, or make some arrangement for money to purchase 'immediately?' If he knew that it was the understanding of himself and his vendee that the contract should be settled upon differences, he might well ask his factor to advance the small sum required to pay differences. This would have been nothing extraordinary; and to my mind it is perfectly clear that when he said 'cover rye,' and do it 'immediately,' he

meant that his factor would purchase rye on time for future delivery to meet his own contract for September delivery. Then one contract could be made to balance another by the mere payment of differences; and we shall presently see that the plaintiff's factor so understood him, and proceeded to make the purchase accordingly, and settle the plaintiff's contracts upon the differences. In this way the plaintiff sought to protect himself against loss which might result from a still further advance in rye. We cannot for a moment suppose that the plaintiff meant to ask his factor to take $12,000 in cash out of his own pocket, and purchase 15,000 bushels of rye in store for his protection. He clearly had in view a purchase by which his factor could settle the contracts to be 'covered' by the mere payment of differences." The learned court in this case had the correct idea of what is meant by the word "cover," as used in speculative transactions, and he has accurately stated what a commission merchant would do when directed by his principal to cover a short sale. But how does this show that the short sale was a wager upon the market price? Both the contracts remained extant, and would, in the regular course of business, be performed by the commission merchant. He took the risk of their performance by the other parties, and he settled with his principal as though they were performed. What the principal paid to the commission merchant, was precisely the difference between the price named in the selling contract and the price named in the purchasing contract. There was no evidence in this case that the plaintiff intended to cover his short sale when he made it; but

even if he did, as we have seen, this would not have made the transaction illegal.

All these opinions seem to proceed upon the theory that any arrangement, by which a person making contracts for future delivery through a broker or commission merchant, will receive from or pay to the broker or commission merchant the difference between the purchasing and selling price, is unlawful. A moment's reflection will show the error of this. A person engaged in pure speculation through a member of an exchange, never intends to handle the goods in which he speculates; and this has been repeatedly held to be legal, provided the contracts made by the commission merchant were real and valid.[1] The commission merchant and the parties with whom he deals for his principal's account are the persons who are to prepare for delivery, and who are to offer or demand the goods sold. Whether or not the principal directs his rights under the contracts made for his benefit to be transferred, can have no possible effect in determining that the contracts which were made for his account were wagers. In such speculative transactions the settlement and payment of differences by the commission merchant to his principal before the contracts mature, is a matter purely of convenience or favor; possibly, as it is so universally done, it might be considered a right. The custom of so settling grows out of the fact that the commission merchant guarantees the performance of the contracts which he has made for his principal's account. He might, it is true, wait until the party of whom he bought delivers to him, and he in turn delivers to the purchasing party, and then pay

[1] See Rule 1, Chap. V.

the difference to his principal. The result would be precisely the same if he settled with his principal as soon as the *contra* transaction was made, because inas much as he guarantees the performance of the contracts it would make no difference to his principal whether the third parties performed or not. It is quite impossible to reconcile these cases with other cases heretofore cited,[1] or with the well known methods of doing business on the exchanges. At the most, however, they show simply the reasons which induced the judges to find the fact that the parties intended nothing but wagers; whereas other judges, with better information, have come to just the opposite conclusion. Whether such facts, being claimed to have a tendency to show an unlawful intention, would be admissible in point of law for that purpose, will be considered further on.[2]

In a speculative transaction for future delivery, as has been said, the first step is to buy or sell, and it is closed by a *contra* transaction of a sale or purchase as the case may be. The last contract is sometimes called a "closing out" or a "cover."

ORIGINAL ENTRIES NOT PRODUCED—INABILITY OF COMMISSION MERCHANT TO GIVE NAMES OF PERSONS WITH WHOM HE DEALT, OR TO STATE WHERE THE ARTICLE WAS AT THE TIME OF CONTRACT.

In Gregory *v.* Wendell,[3] among the "suspicious circumstances" which were claimed to show that cer-

[1] *Ante,* page 115 *et seq.*
[2] See Chap. IV.
[3] 39 Mich. 337.

tain transactions, alleged to have been made in Chicago by one commission merchant through another, were not actual sales, were the facts that the latter did not produce the original entries, and was unable to give the name of the person from whom the purchase was made, or where the article purchased was at the time, or to whom he afterwards sold it. Certainly these facts, excepting the one that he did not know where the article was, would, if unexplained, tend to show either that the transactions claimed to have been made, were not real purchases or sales, or that no transactions at all had been made for the principal. The fact that the location of the article sold was not known, is of no importance, for, it has been repeatedly decided that even though it had no existence at the time of the sale, that would not make the contract a wager.[1] The party selling could go into the market at any time and purchase it before the time for delivery. While the inability to give the original entries, and the names of the parties with whom the commission merchant dealt, would, as between himself and his principal, have the tendency indicated; yet in the ordinary speculation through a modern commission merchant—a member of an exchange—inasmuch as the third party and the principal are unknown to each other, and the commission merchant guarantees to each party the contract made with the other, it would seem by the case of Gregory *v.* Wendell,[2] to make little, if any, difference who the third persons were, or what contracts were made by the commission merchant; provided the relation between the principal and his agent was *bona fide*, and he was employed to make,

[1] See, *ante*, page 95.

[2] 40 Mich. 432.

and reported that he had made, real contracts. Whether or not the commission merchant could protect himself against loss on a contract he had reported to have made for his principal by making wagering contracts with third parties, would depend upon the construction of the contract between the principal and the commission merchant. The case of Gregory *v.* Wendell[1] seems to make the rights of the principal depend upon the contract between himself and his commission merchant, rather than upon the rights the principal has in the contracts made with third persons by the commission merchant; and in that view it would be of but little importance what the commission merchant did in order to enable him to keep his agreement with his so-called principal. In the case of Irwin *v.* Williar,[2] the modern commission merchant, a member of an exchange, is held to all the responsibilities of the old common law factor. The precise relation of members of the New York Stock Exchange and their principals has been determined in the State of New York in the case of Markham *v.* Jaudon;[3] but the precise relation between members of other exchanges has never been determined so far as the author knows.

INADEQUACY OF CONSIDERATION.

In Chandler's case,[4] the result of the put contracts made by Chandler with the different members of the Chicago Board of Trade, showed that the losses made

[1] 40 Mich. 432.
[2] 110 U. S. 499. See also Higgins *v.* McCrea, 116 U. S. 671.
[3] 41 N. Y. 235.
[4] See page 36.

by Chandler in his failure to make the corner, were nearly $400,000, and he had sold the privileges for less than $19,000, which was, the court said: "A disparity between the consideration paid and sum demanded, which strikes the mind at once as being so grossly inequitable, that the judicial conscience is shocked and revolts from being made the instrument for enforcing such outrageous injustice." It seems hardly fair that individual purchasers of privileges from Chandler should have been made to suffer for the combined results of the struggle between Chandler and the others. The only real remedy for the trouble, if it be one, is to make these pure option contracts void by statute, and then all parties would know the risk they take in entering into them. Whether, on the whole, such contracts are injurious to the public or not, is doubtful. At any rate, it is believed that far more harm is done by courts in declaring them void on the ground of public policy, than to strictly enforce them. In the latter case the evil would cure itself. And besides, it is not within the strict province of courts to determine what contracts are *contra bonos mores*, and what not. Take for instance this very case. The wrong was committed by Chandler. He attempted to corner the market, and in doing so bought all the cash oats, and as a part of his plan, made contracts by which he gave the privilege of putting other oats upon him at a given price, his object being to make the market price so much greater than that named in the contract, that the party holding the privilege could not afford to buy the oats and deliver them, and that therefore he would simply have lost the opportunity

to make a profit in the market. For these put contracts the parties owning them paid, in every instance, a consideration in money, and even admitting that their object was to break Chandler down; was not that a benefit to the community? And besides, no one could know whether the parties buying the privileges were engaged in the effort to prevent the corner or not. The court found as a fact, it is true, that it was notorious upon the Chicago Board of Trade, and that all the parties making contracts with Chandler were presumed to know of the attempted corner. But the fact remains that the contracts made with Chandler were perfectly legitimate, and the court brings them within the class of wagers simply because it finds that the parties holding them did not intend, in all events, to demand the acceptance of the oats by Chandler, but did intend and expect that the matter would be adjusted by the payment of differences. But the oats were tendered to Chandler and he knew he ran the risk of this, when he made the contracts. That either party may insist upon the performance of his contract, determines that it does not have the character of a wager. If it be wrong to attempt to make a corner, the party attempting it should be punished, not those who incidentally make *bona fide* contracts with him. If it be against good morals to make a corner, the legislature should then provide for the punishment of the same. This was subsequently done in Illinois.[1]

In this connection a citation from the case of Brown *v.* Speyers [2] is not inappropriate. This was an action brought by a gold broker to recover losses made by

[1] See, *ante*, p. 21.

[2] 20 Grat. 296.

him in the purchase and sale of gold in New York soon after the close of the Rebellion. It was claimed that contracts for the sale of gold are illegal, because they are supposed to contravene considerations of public policy. Staples, J., said: "The courts are very adverse to holding contracts illegal upon the ground of public policy, unless the question is free from all doubt." And Bert, C. J., said: "We are not disposed to yield to arguments of public policy; the judges had gone much further than they were warranted in going on such questions; that they had taken on themselves, sometimes, to decide doubtful questions of policy; and they were always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which enter into the judgment of those who decide on questions of public policy. Judge Story has said that courts have never really defined it. That it varies with the habits and fashions of the day, with the growth of commerce and the usages of trade. * * * There is nothing in this record, this court has no data, no facts before it, which enable it to declare that the business of buying and selling of gold injuriously affects the currency, the trade, or morals of the country. We may indulge in speculative opinions upon the subject, but it would be going very far to pronounce such transactions illegal upon some vague and indefinite notion that their tendency is to violate public policy."

CORRESPONDENCE.

In several cases the letters of the parties were used to show the intention with which they were operating.[1]

THE IDENTICAL GOODS SOLD NOT DELIVERED.

In Sawyer *v.* Taggart,[2] concerning cotton futures it was said: "Counsel contend that it is not shown that the goods bought for Hamiltons were resold; that sale may have been made on an equal quantity of the same kind of goods, but that this was not a resale of the same identical goods, and therefore that there is no evidence that the persons to whom sales were made for their account, became bound to perform the contracts made for them. To this argument there are two conclusive answers: From the very nature of a contract for future delivery, the sale is not of ascertained articles, but of articles of a designated kind, to be selected at the time of performance, and may be discharged by the delivery of any articles answering to the general description given in the contract. Neither the goods purchased nor those sold for account of Hamiltons were ascertained when the sales for their account were made, but the evidence shows that the delivery orders received from those from whom purchases were made for them, and which represented the property purchased, were passed to those to whom sales had been made, and thus represented the property sold. And again, if the identical goods were not resold so as to obtain some

[1] Cobb *v.* Prell, 15 Fed. Rep. 774; Clarke *v.* Foss, 7 Biss. 540; Justh *v.* Holliday, 11 Wash. R. 418.

[2] 14 Bush, 727.

one else to receive and pay for them, Sawyer, Wallace & Co. remained bound to do so, and the contracts were thus, in any event, to be performed by some one. The fact that Hamiltons intended not to receive and pay for the goods, but to resell them, furnishes no ground for holding that it was tacitly understood that the contracts were not to be performed, and were to be settled by the payment of differences."

TWO DIFFERENT FORMS OF STATEMENT.

In Cobb *v.* Prell,[1] it appeared that the plaintiff was a commission merchant at St. Louis, employed by the defendant, who was a grain dealer residing at Columbus, Kansas, to sell for him certain quantities of corn to be delivered to the parties to whom the plaintiff might sell the same, at the option of the defendant, during the month of May, 1881. It was claimed in defense that the contracts made were wagers, and the court, in considering the question, said it appeared that the plaintiff "adopted and had in use two blank forms on which statements of accounts were rendered to his dealers, one of which was used when the grain was actually delivered, and the other when it was not delivered, and the settlement was made upon the basis of the differences. In the former statement, as might be expected, we find charges for freight, inspection, insurance, weighing, storage, and commissions. These are charges which necessarily entered into the transactions when the grain was shipped or delivered. In the latter statement these items do not appear. They show only the number of bushels of grain bought, the price

[1] 15 Fed. Rep. 774.

at which bought, and the month of delivery, the price at which the same was sold, and the net gain or loss. There are in evidence 34 of the last named bills used in the settlement of option deals between June 26, 1881, and July 30, 1881, all representing transactions between the plaintiff and the defendant. Of the bills representing sales from the defendant to the plaintiff, between September 18, 1880, and April 19, 1881, there were 57; so that it appears that the course of dealing between the plaintiff and defendant was such that sometimes the corn contracted for was to be delivered, and at other times it was not to be delivered, and the transactions were to be settled upon the basis of margins." It is to be remarked, that if the plaintiff as commission merchant for the defendant had started with an idea of doing nothing but a purely speculative business, intending that all contracts should be closed out before delivery, and that his commission merchant should only pay to him the profits or be paid the losses, that is, the differences between the purchase and selling prices, the second form of statement would necessarily have been used. How then does it prove or tend to prove of itself that the transactions represented by the bills were wagers? Moreover, to one acquainted with the methods of trading, the fact that so large a number of these transactions were made at about the same time as actual shipments, tends very strongly to prove that the transactions in options were intended as protection for the actual shipments.

It is a very common thing for a shipper of grain or other commodities to make contracts through his commission merchant to protect himself against failure of his crop or violent fluctuations in the market price.

He might do this by purchasing a pure option, or by making the ordinary "future" or "option" contract. Even the bitterest opponents of speculation admit that such a use of an "option" is legitimate and proper. If the regular ordinary "future" or "option" were made for such a purpose, the form of account condemned in Cobb *v.* Prell must have been used. Therefore it follows that there is no necessary connection between such a form of account and wagering.

WHERE THE PARTY WAS NOT A DEALER IN THE COMMODITIES BOUGHT OR SOLD.

In the case of Kent *v.* Miltenberger,[1] it was claimed that because the defendant was not a dealer in and had never bought or sold wheat for his own use or exportation, that this in connection with his own testimony that the transactions in which he was dealing were option deals, and that by option dealing he meant buying and selling wheat with the expectation of catching an advance or decline—betting that the price will go up or down, and that the plaintiff was apprised of his intention in these matters, showed the contracts which the plaintiff made for him, as his broker, on the Merchants' Exchange of St. Louis, were wagers. The contracts made by the plaintiff were the regular contracts for future delivery known on the exchange as "option deals," the only option in them being the privilege of delivering wheat on any day within a specified month. In these contracts delivery is always contemplated, not as a thing which will really be insisted upon, but a thing which the pur-

[1] 13 Mo. App. 503.

chaser *may* insist upon. The court said: "The law puts no restraint upon trade which renders it unlawful for a person to buy or sell commodities in which he does not generally deal, if he thinks he can catch a favorable turn of the market and make money by so doing."

On the other hand, in the case of Tenney *v.* Foote,[1] it appeared that the defendant was a mechanic, apparently rather inexperienced in matters outside of his own proper business. No special stress was laid upon this fact, but it was stated by the court and evidently had weight with the judge in determining that the contracts made were of the class prohibited by the Illinois statute. In Jackson *v.* Foote,[2] where precisely the same question arose between another plaintiff and the same defendant, the learned court reached a different conclusion and gave judgment for the plaintiff.

In the case of Beveridge *v.* Hewitt,[3] it appeared that McCurdy, who was the real defendant in the case, had never been engaged in buying or selling wheat, corn, pork, lard, or other like commodity, and this, with other facts, was considered in determining that contracts made for the defendants by the plaintiffs on the Chicago Board of Trade were wagers.

[1] 4 Bradw. 594.
[2] 12 Fed. Rep. 37.
[3] 8 Bradw. 467.

CHAPTER IV.

EVIDENCE.

In the preceding chapter we have examined at considerable length the cases wherein a great variety of facts and circumstances indicated, as it was claimed, the existence of an unlawful intention to make contracts, in the forms of commercial transactions, covers for wages. It will be observed that some judges reached one conclusion as to this intention from a consideration of certain extrinsic facts, while other judges, upon the same facts, reached just the opposite conclusion. This is due partly to the weight which the respective courts gave to the collateral facts in determining the question of unlawful intention; and partly to misconception of the facts themselves. As was said by one learned judge who was struck with this want of harmony in the cases: "More confusion and discrepancy has crept into them from a failure to determine precisely the facts than from any essential difference of opinion upon the abstract propositions of law applicable to them."[1]

It remains to be considered what facts are in law admissible to show this unlawful intention, so as to make it proper to submit the question to the jury.[2]

[1] Clarke *v.* Foss, 7 Biss. 540.

[2] The cases in which questions purely of admissibility of evidence were distinctly decided, are not numerous. In reading this chapter reference should be made to the corresponding sections in the preceding chapter. Where there are conflicting opinions, the author has followed what he considers the better authorities.

In Gregory *v.* Wendell,[1] the action was brought partly to recover back one thousand dollars placed by the plaintiff in the hands of the defendant as a margin for transactions in the form of purchases and sales of corn, but which the plaintiff claimed were wagers. The defendant acted as commission merchant of the plaintiff. The court instructed the jury that no part of the one thousand dollars could be recovered; and it was claimed that the court erred in not submitting to the jury the question, whether any corn was ever actually purchased. On appeal it was said: "There were suspicious facts and circumstances in this case. The weight thereof, or the proper conclusion to be arrived at from a view of the whole case, it is not for the court to determine. The whole case, under proper instructions, should have been submitted to the jury, and the court erred in withdrawing the case from them."

The first rule, then, is that any fact or circumstance which raises a suspicion of the good faith of the parties to the transaction, may be shown in evidence, and, anything of that character appearing, the whole question should go to the jury. [2]

But the question, what facts and circumstances raise such a suspicion, still remains.

In Barnard *v.* Backhaus,[3] the learned judge said, it is the duty of the courts to scrutinize very closely these time contracts, and to this we fully agree; but

[1] 39 Mich. 337.

[2] See the case of Lowry *v.* Dillman, in the latter part of this chapter, as illustrating this rule.

[3] 52 Wis. 593. See also Lowry *v.* Dillman, 18 N. W. R. 4.

such contracts being allowed by the law, it is also the duty of the courts to see that they are enforced when made *bona fide*, and not allow innocent parties to be injured by submitting a case to a jury upon facts which show simply that the parties are speculating.

In Smith *v.* Bouvier,[1] the trial judge in his charge to the jury said: "I submit it to you, that if the transaction were a speculation founded upon a real sale and purchase of stocks by the plaintiff for the defendants, which were actually sold, bought, and delivered, it is not a gambling transaction, and not an unlawful contract." The defendant insisted that the jury should have been instructed, that all purchases of stock with a view to resell and make a profit on their rise, or contracts to furnish stocks on time, should be declared gambling transactions and illegal, not only between buyer and seller, but also as to the brokers or agents through whom the purchases and sales had been made. Upon this claim the appellate court said: "This would make a great inroad into what has for an indefinite period been regarded as a legitimate business, and would either destroy it altogether, or if continued, put the brokers at the mercy of those for whom they transacted such business. Let it be understood that a broker has no power to recover either for advances or commissions, however honestly he may have dealt, and there will be found enough people whose easy consciences would throw their losses upon the shoulders of those who advanced the money and earned commissions in their service.[2] It would be a very palpable wrong to the brokers who are hired to do such business if such were held to be law." In striking contrast with

[1] 70 Pa. St. 325.

[2] See Chap. V, Rule I.

this language is the action of the same court in the later cases, where precisely this wrong was done; and especially in the case of Dickson *v.* Thomas,[1] where the facts disclosed were those of the ordinary stock speculation through a broker, and where the court took the case from the jury, and decided as a matter of law, that the parties were gambling. Great as may be the admitted evils of speculation, they are not so great as a neglect or refusal by the courts to observe the plain distinction between speculation and gambling. Take as an illustration the case of Flagg *v.* Baldwin.[2] The Flaggs had speculated on the money of Baldwin, who had trusted them for over eleven thousand dollars, and paid out that amount of money for them in the actual purchase and sale of stocks in New York. It was pure speculation and nothing else. Such decisions are only possible by ignoring the distinction between speculation and gambling, or else by assuming legislative functions in attempting to make speculation unlawful. This distinction should be enforced in rulings upon the admissibility of evidence.

The second rule is that evidence of facts and circumstances which are consistent with good faith, or tend to show that the parties intended to speculate only, is not admissible to show an intention to wager.

As an illustration and as proof that this rule is correct, let us take a case where it is admitted that a party purchases for future delivery through a broker, and intends to sell out before the time for delivery ar-

[1] 97 Pa. St. 278.

[2] 38 N. J. Eq. 219. See statement of this case, Chap. V, Rule I.

rives. This intention, it has been decided in a number of cases, does not make the transaction unlawful, and has no tendency to prove that the contract made was a cover for a wager. As another illustration, take the case of a short sale. This has also been repeatedly determined to be lawful. If, then, either or both of these facts are claimed to show an intention to wager, evidence of them would be clearly inadmissible, though both of them indicate unmistakably an intention to speculate.

In States where it has been decided that these facts indicate an intention to wager, evidence of them would, of course, be admissible under the rule.[1]

The third rule is that evidence of facts and circumstances which are inconsistent with good faith or an intention to speculate merely, and tend to show that the parties were wagering, is admissible.

What facts and circumstances considered in the previous chapter tend to show only that the parties intended to speculate? and what facts and circumstances tend to show that they intended to wager upon the market price?

For the purpose of discussing these questions it will be found convenient to classify the facts and circumstances as follows: First, those which are inherent in the contracts, as options; second, those which existed at the time the contracts were made; including the fact that at the time of sale the vendor neither had the goods in his possession, nor had entered into any

[1] Dickson *v.* Thomas, 97 Pa. St. 297; Flagg *v.* Baldwin, 30 N. J. Eq. 219.

contract to buy them, nor had any reasonable expectation of becoming possessed of them at the time appointed for delivery, otherwise than by purchasing them after making the contracts; that margins were or might be required; that the purchaser at the time of purchase intended to resell before the time for delivery arrived; the financial status of the parties; that the parties were engaged in a large number of speculative transactions; that the party was not a dealer in the commodities bought or sold; and prior conversations and dealings; third, those which are imposed by the rules of the exchanges; including usages, margins, rings, symbolical delivery and clearing-houses; fourth, the fact that there are more sales than goods in the market; and fifth, the acts and omissions of the parties after the contracts are made; including subsequent settlements; *contra* transactions; transfers before the time of delivery arrived; no grain offered or demanded; contracts closed the same day; no deal lasting through the option; no preparation made for delivery; covers; symbolical delivery; original entries not produced; inability of broker to give the names of the parties with whom he dealt for his principal's account, or to state where the articles were at the time; inadequacy of consideration; correspondence; the identical goods not delivered; two different forms of statement used.

Options.—In reference to the first class it has been determined by a large number of decisions, that the mere fact of either party having by the terms of a contract the option to deliver the goods between certain days, did not make the contract unlawful. If the action was between the principals to the contract, and was

brought for its breach, no question of evidence could arise, as this feature would be shown by the statement of the case. So it would be in the case of a pure option contract. On demurrer to such a complaint the court would surely overrule it, except in States where the latter contracts are made illegal or void by statute. Where money has been paid on account of such contracts no action could be sustained to recover it back; and a complaint based on this fact alone would undoubtedly be determined, on demurrer, as not setting forth a good cause of action.

In Kent *v.* Miltenberger,[1] the validity of the ordinary grain option contract for future delivery used on the Chicago Board of Trade was considered. The court said: "It is perceived that these contracts were what are known in the slang of the exchange as 'option deals,' the seller having the option to make delivery of the commodity sold within certain days. There is much evidence in the record as to the general character of these contracts and the manner in which they are executed and discharged. It appears that delivery is always contemplated, not as a thing which will be necessarily insisted upon, but as a thing which the purchaser *may* insist upon. It sufficiently appears that this is the one thing which gives vitality to such contracts and which enable those who, during a particular month, are on the successful side of them, to get up what is known as a 'corner.' A very large majority of these contracts are, no doubt, merely speculative, but many of them are actual purchases by manufacturers and exporters. From what has been

[1] 13 Mo. App. 503.

said concerning them, it appears that there is no essential difference between them and the numerous contracts of the same kind which have been before the courts in England and in this country, and which have been almost universally upheld as valid contracts. All these decisions unite upon the proposition that these contracts are presumptively valid, but though valid on their face, they may be shown by extrinsic evidence to have been intended by the contracting parties, not as commercial transactions, but as mere wagers on the future state of the market; that the one thing which makes them wagers and renders them invalid is an agreement between the contracting parties made at the time of the contract and understood as part thereof, that it may be discharged by the seller, not by actual delivery of the commodity sold, but by the payment of a difference. * * * There is no evidence in this case of such an agreement, either between the plaintiff and defendant, or between the plaintiff and the parties to whom they sold the wheat for the defendant. There was, therefore, no question to go to the jury as to whether or not this was a gambling contract."

All the cases, except Barnard *v.* Backhaus,[1] Cobb *v.* Prell,[2] Beveridge *v.* Hewitt,[3] Stebbins *v.* Leowolf,[4] and possibly Chandler's case,[5] hold that these contracts are presumed to be *bona fide*, and in order to show them to have been used as covers for wagers, an agreement to that effect must appear to have been made. According to these excepted cases option contracts are presumed to be invalid, and proof must be made that they are *bona fide*.

[1] 52 Wis. 593.
[2] 15 Fed. Rep. 774.
[3] 8 Bradw. 467.
[4] 3 Cush. 137.
[5] *Ex parte* Young, 6 Biss. 53.

In reference to the second class, they all, with the exception of the last two, relate to speculation exclusively, and have no tendency to prove an intention to gamble on the market price.

Not Owning or having Possession of the Goods Sold.—It has been repeatedly decided that the fact of the seller not owning or having possession of the articles sold, or in other words, selling "short," has no tendency to prove a wager.

In Kent *v.* Miltenberger,[1] the action was brought to recover a sum of money claimed to be due to the plaintiffs from the defendant on account of certain sales of wheat for future delivery made by the former as broker for the latter on the floor of the Merchants' Exchange of St. Louis. The defendant was also a member of the exchange. He was not, however, a dealer in grain, but he dealt in liquors. He had no wheat to sell in the sense of having it in his actual possession or expecting to have it in his actual possession, and he did not wish to buy any wheat in the sense of receiving it in kind for any purpose connected with the business in which he was engaged. He simply bought and sold, as hundreds do, for speculation. The court said: "There is nothing unlawful in this. The law puts no restraint upon trade which makes it unlawful for a member to buy or sell commodities in which he does not generally deal, if he thinks he can catch a favorable turn in the market, and make money by so doing. What one man is at liberty to do in this respect, another man is equally at liberty to do.

[1] 13 Mo. App. 503.

Furthermore, the fact that a man does not have on hand the commodity which he undertakes to sell for future delivery at the time when he makes the sale, and that he does not expect to have it on hand until the time arrives for delivery, but that he expects then to go upon the market and purchase to fill the delivery in pursuance of his contract, does not in any degree impair its validity. What he may do by himself in this respect he may obviously do by the agency of another. He may employ a broker to make the contract for him and to execute it for him, in any manner in which it would be lawful for him to make it and execute it if acting for himself in person. Any man, though not a dealer in wheat, may therefore lawfully employ a broker on exchange to sell wheat for him for future delivery at a future time, and execute contracts for him by purchasing upon the market the wheat for delivery, when the time arrives for its delivery, or by settling with the purchaser by the payment of the difference between the contract price and the market price, if the purchaser shall waive the execution of the contract by the delivery of the wheat, according to its terms. Now, that was precisely the contract which the defendant made with the plaintiffs in each of the transactions involved in this suit. There was not only no agreement that the contracts which the plaintiffs made for the defendant should be settled without delivery, but the contracts on their face purported the contrary, and not a word was written or said indicating that it was the intention that the contracts should be in any respect different from what they purported to be on their face. Both the

plaintiffs and defendant, being members of the exchange, knew that contracts of this kind, made on the floor of the exchange, and subject to the rules of the exchange, would have to be executed by actual delivery, if delivery should be insisted upon. They moreover knew that the plaintiffs, placing themselves under the rules of the exchange, toward the purchasers of the wheat, in the position of principal contracting parties, would have to make good the contracts upon their own responsibility if necessary, and would, if delivery should be demanded, when the time came, have to go upon the market and purchase the wheat for delivery. They not only knew that this would have to be done, but the evidence shows that, as to a part of the transactions, it actually was done. That the plaintiffs, in the execution of the contracts involved in this suit, actually purchased and delivered twenty-five thousand bushels of wheat for the defendant. The fact that the contracts for the delivery of the remaining thirty-five thousand bushels were settled by the payment of differences, upon a subsequent waiver of actual delivery by the purchaser, neither rendered them unlawful in their inception nor in their final execution; for it has never been held that a lawful contract cannot be discharged by the voluntary act of the other in accepting the pecuniary equivalent for its performance. In this state of facts, what is the evidence upon which the defendant seeks to impeach its validity? It is his own testimony to the effect that although the contract was such as is above named, yet his intention was not to buy or sell, but to gamble, and that the plaintiffs knew that this was his intention and made

themselves the instruments for carrying out the same. He simply says in his testimony that these transactions were 'option dealings;' and by 'option dealings' he means selling or buying wheat with the expectation of catching an advance or decline—betting that the price will go up or down, and that plaintiffs were apprised of his intention in these matters. This, in connection with the fact that he was not a dealer in wheat, and had never bought or sold wheat for use or exportation, which fact was known to the plaintiffs, is the ground on which the court was asked to give the following instruction: 'The court instructs the jury, that if they believe from the evidence that defendant, in all the transactions in question, had no expectation or intention of delivering the wheat alleged to be sold by the plaintiffs on his behalf, but only contemplated in such transactions speculative wagers upon the changes in the market prices of wheat, to be settled by the payment of differences only, and that the plaintiffs were at the time of said transactions fully cognizant of and participated in this expectation and intention, and actually abetted, with such knowledge, said purpose of defendant, then it is immaterial that, as to parts of said transactions, plaintiffs made sales to third parties as agents or brokers, and your verdict must be for the defendant.' We think the court committed no error in refusing this instruction. * * * The law distinctly defines the characteristics of a gambling contract when it takes the outward form of buying or selling for future delivery. To that definition we must adhere. * * * The one thing which makes them wagers and renders them invalid is an agreement between the contracting parties, made at the time of the con-

tract, and understood as part thereof, that the contract may be discharged by the seller, not by delivery of the commodity sold, but by paying to the purchaser the difference between the market price on the last day of the performance of the contract, and the price at which the sale was made. * * * There was therefore no question to go to the jury as to whether or not this was a gambling contract."

In the case of Rumsey *v.* Berry,[1] the action was brought to recover a balance alleged to be due from defendant to the plaintiff upon the following facts: The defendant, a resident of Bangor, Me., was in Chicago, Ill., and there met the plaintiffs who were commission merchants and members of the Board of Trade of Chicago. He authorized them to sell for him ten thousand bushels of wheat to be delivered at any time he, the defendant, pleased during the month following. The plaintiffs thereupon, in their own name, contracted to deliver said wheat to third parties. By custom and law at Chicago, so long as the defendant furnished to the plaintiffs sufficient margins to secure them against loss in the event of a rise in the price of wheat, the plaintiffs must carry said contract along, upon, and under the direction of the defendant until the last of May; but if on demand for additional margins upon the rise in the price of wheat the margins were not furnished within a reasonable time, then the plaintiffs had a right at any time to purchase wheat at the market price to fill such contract, or to settle upon the best terms possible with the parties with whom they had contracted to deliver the wheat, and claim of the de-

[1] 65 Me. 570.

fendant reimbursement for any loss incurred. Soon after the order was given the wheat commenced to rise in price, and upon demand the defendant furnished seven hundred dollars as a margin; but wheat continuing to advance, upon further demand for margin and the defendant failing to furnish it, the contract was cancelled by the plaintiffs and the parties with whom they had contracted, at a loss of about three thousand dollars, only seven hundred dollars of which was covered by the margin so deposited. This suit was to recover the difference, and the verdict of the jury was for the full amount claimed. The defendant testified on the trial that at the time the plaintiffs and defendant entered into this contract the defendant had no wheat and that the plaintiffs knew it, but it was proved, and admitted by the defendant, that, in pursuance of the agreement of the plaintiffs to sell wheat for the defendant, the plaintiffs did contract with certain persons at Chicago, and became personally responsible to deliver to them ten thousand bushels of wheat on some day in May at the seller's option, and that they actually delivered the wheat, or made satisfactory settlement with the parties, at a loss of about three thousand dollars. Hence the defendant claimed at the trial, and his counsel asked the presiding judge to instruct the jury, that said contract was merely betting upon the price of wheat during the balance of the month of April and the month of May, and therefore a wagering contract illegal and invalid as a foundation of an action. This instruction the presiding justice refused to give, but did instruct the jury that such a contract would be valid under the laws of Maine, and, in the absence of proof to the contrary, would be pre-

sumed to be valid under the laws of Illinois where the contract was made. Upon appeal the court said: "We utterly fail to discover any wrong on the part of the plaintiffs. It is true they were aware that the defendant at the time had no wheat. But the fact itself being immaterial their knowledge of it is equally so. It is not only fair but perfectly legal, and sometimes necessary, to contract for the future sale and delivery of the article which at the time has no existence, but which afterwards is to be purchased, raised, or manufactured."

In Yerkes *v.* Salomon,[1] the action was brought to recover an agreed amount of damages for the breach of certain "put" and "call" contracts for railroad securities. Upon cross-examination of the plaintiff he was asked whether at the date of the contracts he had the stocks referred to in them. This was objected to as immaterial, and was excluded. The court said upon this point: "The contracts were not assailable as in contravention of law because the plaintiffs, assuming such to be the fact, had not at the time they were made the certificates of stock in his possession."

Margins.—In the case of Sawyer *v.* Taggart,[2] it was contended that the rules of the New York Cotton Exchange were so framed, and the course of dealing there such, that they proved or tended to prove that the parties understood the contracts, between members of the exchange, were not to be enforced. Among the rules referred to was one requiring margins to be put up between the members. Upon this point the court said: "Rule six relates to margins, and we do not

[1] 11 Hun, 471.

[2] 14 Bush, 727.

perceive that it has any bearing upon the question in this case." Certainly if a rule requiring margins to be put up has no bearing upon the question of wager, the fact of putting them up could not have any. This is the only decision which might be considered as determining the question of admissibility of evidence of the fact that margins were or might be required. In most cases the fact would appear as a part of the *res gestæ*, but undoubtedly if the legality of transactions should be claimed to depend upon the fact of margins being put up or required, the court would hold evidence of this to be inadmissible.

Where the Purchaser at the Time of Purchase intends to Resell before the Time for Delivery Arrives.— There does not appear to have been any decision where a question purely of the admissibility of evidence upon this point was decided. Yet inasmuch as almost universally this intention has been held to be lawful, it is believed that courts would undoubtedly reject testimony offered to prove it. As we have seen, selling "short" is lawful, and evidence to prove the fact, that the party did not, at the time of the sale, have the articles which he sold, but intended to purchase them at or before the time of delivery arrived, is inadmissible. It is apparent that a person selling "short" must intend to speculate, because in order to complete the sale he must go into the market and buy the article which he has sold; the result of such a transaction being the difference between the two prices, which the speculator makes or loses. If he buys intending to resell, and does resell, the same result follows. The rule governing the admissibility of

evidence to prove one of these facts would apply to the other.

Financial Status.—In the case of Kirkpatrick *v.* Bonsall,[1] it was decided that evidence to show the financial inability of a party purchasing options for large quantities of oil to pay for it, was admissible to show that the purchases were not made in good faith and for a business purpose. The other cases, while not determining directly questions of evidence, are substantially to the same effect. These cases have been fully examined in the section on this subject in the preceding chapter. It remains here only to be said, that proof of this fact would have the tendency stated where the transactions were between principals to the contracts, but it is plain that where a person is speculating through a broker or commission merchant, it is manifestly wrong to test his good faith by his ability to pay the full value of the articles speculated in.

It clearly appears by the better authorities[2] that a person may speculate through a broker or commission merchant, intending to receive from or pay to his commission merchant or broker the differences only between the purchasing and selling prices. Practically, as business is now done, the chances of his having personally to take or deliver the commodities which he buys or sells, are so small that he is morally certain of being required to pay only the losses resulting from

[1] 55 Pa. St. 155.

[2] Sawyer *v.* Taggart, 14 Bush, 727; Thacker *v.* Hardy, 27 W. R. 158; s. c. L. R. 4 Q. B. D. 685; Hatch *v.* Douglass, 48 Conn. 116; and authorities, *passim*, in preceding chapter.

a purchase and sale, and unless the fluctuations are extremely violent, this would require only a very small proportion of the actual value of the commodities speculated in. It becomes apparent, therefore, that the *fact* that he has not means sufficient to take and pay for the articles he purchases, or to purchase and pay for the articles he has sold "short," is no proof that he has not means sufficient to carry on his speculations, nor does it prove or tend to prove that the contracts made by the broker or commission merchant for his account, are not real.

The cases considered in the previous chapter were mostly cases of speculations through brokers or commission merchants, but, notwithstanding this, it is believed that the true view is stated above.

Where the Parties were engaged in a large number of Speculative Transactions.—This head-note means, as an examination of the authorities cited in the preceding chapter will show, that a large number of transactions between the parties had been settled upon the payment of differences. Where such settlements had taken place between principals to a series of transactions, evidence of the settlements would be clearly admissible to prove that the parties were wagering, instead of being engaged in legitimate transactions.[1] If, however, the settlements were between a principal and agent, growing out of contracts made by the agent for and on account of the principal, it is apparent that any number of such settlements would have no tendency

[1] Fareira *v.* Gabell, 89 Pa. St. 89.

to prove that the contracts made by the agent were wagers.[1]

Prior Conversations and Dealings.—Evidence of conversations and dealings between the parties, prior to the making of a contract, which throw light upon the intention of the parties as to whether it shall be considered as a real contract, is admissible.[2]

That the Party was not a Dealer in the Commodities Bought or Sold.—In Kent *v.* Miltenberger,[3] the defendant was engaged through the plaintiffs, who acted as his commission merchants, in buying and selling wheat for future delivery with the expectation of catching an advance or decline in the market price. It was claimed that this, in connection with the fact that he was not a dealer in wheat and had never bought or sold wheat for use or exportation, which fact was known to the plaintiffs, proved the transactions to be wagers, but the court said that there was no question to go to the jury as to whether or not the contracts made by the commission merchant were wagers.

Rules of the Exchanges; Usages.—In reference to the third class, it has been decided that the rules and customs of the exchanges may be shown when bearing upon the question of unlawful intention. In Lowry *v.* Dillman,[4] the contracts were made subject to the

[1] Sawyer *v.* Taggart, 14 Bush, 727; Thacker *v.* Hardy, 27 W. R. 158; s. c. L. R. 4 Q. B. D. 685. See also Chap. V, Rule 1, *passim.*

[2] Brand *v.* Henderson, 107 Ill. 141; Colderwood *v.* McCrea, 11 Bradw. 543.

[3] 13 Mo. App. 503; 1 Greenleaf, sec. 53.

[4] 18 N. W. R. 4.

rules and regulations of the Chamber of Commerce of Milwaukee, and the court thought it was a suspicious circumstance that what these rules and regulations were did not appear in the case.

By the rules of most, if not all of the exchanges, it is provided that each party to a contract for future delivery may be required to deposit a margin to secure the other against fluctuation in the price of the articles dealt in. It is because of this liability, and because also that as between members of the exchanges, they are in all cases required to contract as principals with each other, that they, in turn, require their principals to deposit margins on their contracts. So some exchanges require by the rules that contracts shall be rung out, and others that all contracts shall be executed through a clearing-house. It is obvious that these facts would appear as part of the *res gestæ*. Margins would appear as money advanced as security or as credited on account, and as rings and clearing-houses are methods of delivery, anything concerning them would be admissible in evidence. The effect of these facts has already been discussed at considerable length, and it remains here only to say that it is the duty of the court to instruct the jury, that rules requiring or permitting them do not tend to prove that parties, operating under the rules, were gambling, and if nothing else appears to impeach the good faith of the parties, a verdict should be directed. Settlements through rings and clearing-houses, as has been said, show conclusively that the parties were not wagering, and courts should not allow a case to go to the jury upon these facts alone. In those cases where the courts have characterized these

facts as the methods of gamblers, it is very apparent that they were not fully understood. No one ever heard of contracts in bucket shops, or transactions which were admitted to be wagers on the market price, ever being rung out or settled through clearing-houses.

More Goods Sold than in the Market.—From what has been said in the previous chapter, it is apparent that evidence of the fact that there is more of a given commodity sold than there is in the market, can have no tendency to prove that any given purchase or sale was not made in good faith, and evidence offered for that purpose should be excluded.

Acts and Omissions of the Parties after the Contracts are made.—In reference to the facts of the fifth class it may be said, that anything done or omitted by the parties subsequent to the making of a contract in the form of commercial transactions, which tends to show that their real intention in making it was that it should be a cover for a wager, may be shown in evidence.

That any given sale was settled between the parties by the payment of difference in prices, is no proof that when they made the contracts they intended to so settle. This has been decided in a number of cases.[1] If, however, the parties had been in the habit of so set-

[1] Clarke *v.* Foss, 7 Biss. 540; Sawyer *v.* Taggart, 14 Bush, 727; Gilbert *v.* Gauger, 8 Biss. 214; Fareira *v.* Gabell, 89 Pa. St. 89; Melchert *v.* Western Union Tel. Co. 11 Fed. Rep. 193; Williams *v.* Tiedman, 6 Mo. App. 269; Kent *v.* Miltenberger, 13 Mo. App. 13; Roundtree *v.* Smith, 108 U. S. 269.

tling their contracts, this would be strong evidence of such an intention as to any given contract.[1]

As has already been said, the fact that a purchase or sale by a broker or commission merchant has been settled by a *contra* transaction, proves that it was a real purchase and sale. This fact would appear, however, as a part of the *res gestæ*, but it would be the duty of the court to instruct the jury that it was perfectly legal to settle the transactions between the principal and his agent in that way.

In bucket shops, where the forms of legitimate business are simulated, the business may be done in the form of a sale, and closed by what might be called a *contra* transaction in the form of a purchase, or *vice versa;* but in this case the relation between the parties and the *contra* transaction itself are fictitious. In the cases cited in the previous chapter the *contra* transactions were real, and made simply so that one of them might offset the other, and allow the commission merchant to settle with his principal. Such a plan of operation proves the contracts to have been made *bona fide.*[2] Between principals *contra* transactions would be evidence of an intention to wager.[3]

In reference to the facts that transfers of the commodities bought or sold were made before the time of delivery arrived, that no grain was offered or demanded, that contracts were closed the same day, that no deal lasted through the time limited for exercising the option, that no preparation was made for delivery, and

[1] Bryant *v.* Western Union Telegraph Co. 17 Fed. Rep. 825.

[2] Thacker *v.* Hardy, 27 W. R. 158; s. c. L. R. 4 Q. B. D. 685. See also Chap. V, Rule 1, *passim.*

[3] Byers *v.* Beattie, 16 Weekly Reporter, 279.

that one contract was made to cover another, it is to be observed that in all the cases these facts were considered in reference to the conduct of the principal who was speculating through a commission merchant or broker, and none of them decided questions purely of evidence. These facts are stated by the courts as inducing them to arrive at the conclusion that the parties were dealing in differences. If it is claimed the contract between the principal and his agent was simply formal and a cover for wagering transactions between themselves, evidence of these facts would be admissible. It is perfectly apparent, however, that if the principal has bought with an intention to close out his trades before the time for delivery arrived, all of these facts would be perfectly immaterial as tending to show that the contracts made for the principal's account were fictitious. A speculator who had bought or sold any commodity, expecting to transfer his interest in the contract, or to make a *contra* transaction, and thus make differences only payable to him, would not make any preparation for delivery, and there would be no grain offered or demanded so far as he was concerned, and of course he would make transfers before the time for delivery arrived, and the fact that he did this on the same day the contract was made, or at any time before the option expired, would be in keeping with his original intention, which, as we have seen, is perfectly lawful. The error which seems to have been made in all of the cases considered in the preceding chapter, was in treating the question as though the plaintiff and defendant were dealing *with* each other,

instead of one of them dealing *for* the other as his agent.

From what has already been said in the preceding chapter it is apparent that symbolical delivery, as by warehouse receipts, ringing out, and delivering through clearing-houses, is perfectly legal, and proof of such delivery is equivalent in law to actual manual delivery, and instead of showing the contracts to have been wagers, proves them conclusively to have been made *bona fide.* Of course, it would be permissible to show that the deliveries were made in any one or more of these methods, but the court should instruct the jury that such deliveries were lawful, and did not in themselves tend to prove that the parties were wagering.

Inability of a commission merchant to produce the original entries of the transactions made by him for his principal's account, or to give the names of the persons with whom he dealt, if not explained, would be strong evidence of the fact that the transactions were fictitious;[1] but his inability to state where the articles were at the time of the sale could have no tendency to show that the parties intended a wager, for, as has already been clearly shown, a person may sell that which at the time has no existence even.[2]

Inadequacy of consideration has been fully discussed, and that subject does not present any question of evidence. Correspondence of the parties, if it contained statements which had a tendency in law to prove an unlawful intention, would be admissible.[3]

[1] Gregory *v.* Wendell, 39 Mich. 337.

[2] *Ante*, p. 95 *et seq.*

[3] Cobb *v.* Prell, 15 Fed. Rep. 774; Clarke *v.* Foss, 7 Biss. 540; Justh *v.* Holliday, 11 Wash. R. 418.

It is plain, bearing in mind the distinction between speculation and gambling, that the second form of account described in Cobb *v.* Prell[1] is adapted to speculation, when the articles speculated in were to be, and were closed out before the time for delivery arrived, and so its use alone could have no tendency to prove that the parties were wagering, and if they were offered for such a purpose, should be excluded. They might be admissible as a part of the *res gestæ.*

We have considered in this chapter all of the important facts and circumstances which have been claimed in any of the cases to indicate that the parties who made contracts in the form of commercial transactions, designed them as covers for wagers, so far as the question of admissibility of evidence is concerned. Intention is a mental fact—a determination of the mind[2]—an effect produced by the operation of the mind,[3] and as the fact is hidden from the direct knowledge of other men, the only way of determining its existence is from a consideration of all the collateral facts and circumstances surrounding a given case. From the very nature of the fact, it is not probable that the collateral facts and circumstances which we have considered are all that might exist to show an unlawful intention between parties to contracts for future delivery, but we have examined them as far as they have arisen and been considered in the courts.

There seems to be a little looseness in the application of the rules as to what facts should be allowed to go to the jury to show this intention. The rule that

[1] 15 Fed. Rep. 774.
[2] 1 Bouvier, 730.
[3] Ram on Facts, 1.

this is to be determined in view of all the surrounding facts and circumstances is undoubtedly correct; and it is also true that evidence of facts which happened before and after the principal transactions, may be shown to determine the intention of the parties;[1] and of course every fact belonging to the *res gestæ* would be admissible. It is believed that here the special latitude allowed in the introduction of testimony to prove intention ceases. In many of the cases heretofore cited it seems as though the courts were willing to admit and consider evidence of almost any fact *claimed* to show that the parties were wagering in the forms of legitimate trade, or of facts which, considered alone, could have no such tendency on the theory that they would, when considered together, prove or tend to prove that the parties were wagering. This is undoubtedly error. It has been held repeatedly that the several facts of selling short, buying with the intention to resell before the time for delivery arrived, that the parties at the time of the sale did not have the articles sold, and had no means of obtaining them except by subsequently purchasing in the market, and that margins were put up between the parties to the contract, were perfectly legal and had no tendency to show that the parties were wagering on the market price. How, then, could a combination of all these facts show such an intention? In Sawyer *v.* Taggart,[2] a well considered case, the court examined a great variety of facts and circumstances, and concluded that neither of them nor all of them combined proved that the contracts made by Sawyer, Wallace & Co., for Hamiltons, on the

[1] 1 Greenleaf, sec. 53.

[2] 14 Bush, 727.

New York Cotton Exchange, were wagers, and gave judgment for the plaintiffs.

On the other hand, there may be facts of very little importance when considered alone which would, when taken in connection with other facts, tend to show, and be sufficient to justify a jury in concluding that the parties intended to wager. In such a case it is clear that the judges have nothing whatever to do with the weight of the evidence offered, but should, if any fact or combination of facts appear having this tendency, send the whole case to the jury. As an instance of a combination of facts of little importance, which would raise a suspicion and justify the inference that the transactions between the parties were not *bona fide*, and make it proper to send the whole case to the jury, might be cited the case of Lowry *v.* Dillman.[1] This action was brought on a note, and the defense was that it was given to the plaintiffs in settlement of differences on gambling contracts in barley which the plaintiff had made with the defendant, or with others at his request. At the close of the testimony the learned circuit judge directed the jury to return a verdict in favor of the plaintiff for the amount of the note. The sole question considered in the case was whether there was sufficient evidence to carry the case to the jury on the point, whether or not the note was given for differences or losses in gambling contracts, and the court was clearly of the opinion that the case should have been submitted on the evidence, and that it was error to withdraw it from the consideration of the jury. The defendant was engaged in the business of keeping a saloon in the city of Milwaukee, and the

[1] 18 N. W. R. 4.

plaintiff was a commission merchant doing business in the Chamber of Commerce in that city. There was a violent conflict between the principal parties as to what the agreement was. The evidence given on the part of the plaintiff was that defendant came to the plaintiff's office about the 20th of October, and gave an order to buy for him fifteen thousand bushels of barley to be delivered in November. Thereupon the plaintiff purchased for the defendant this quantity of barley, and paid for it. The defendant had put up a margin of eight hundred dollars. The purchase was made, and the barley was all delivered by the sellers. The plaintiff had the barley ready for delivery to the defendant in November. The defendant, however, was not ready to receive it then, but ordered the plaintiff to carry it through the month of December. The plaintiff did so, and continued to carry the barley, or the most of it, for the defendant until it was finally sold in March by the defendant's order. The note in suit was given in part payment of the actual difference between the price at which the barley was originally purchased and paid for, and what was realized from the sales with the carrying charges and commissions earned in doing the business. This, in substance, was the nature of the transaction which the plaintiff's testimony tended to prove. The court said: "If this is a correct version of the matter the contracts were relieved from all taint of illegality; for actual trades were made, property was actually bought and paid for, and was ready for delivery to the buyer on the contracts when they matured. The transaction was valid; so far, at least, as the plaintiff was concerned. But it cannot fairly be claimed that the evidence

which was introduced on the part of the plaintiff proves any such facts or course of dealings between the parties clearly and satisfactorily. On the contrary, there are many suspicious circumstances surrounding the transactions, even in the light of the plaintiff's own testimony. For instance, he attempts to explain the monthly statements which he rendered the defendant from time to time, and which, as we have said, professed to show purchases and sales of barley on defendant's account, and he is forced to admit that these statements are not accounts of actual purchases and sales. Of course, it is not easy to explain to a person of ordinary intelligence and business experience why the plaintiff, if he really purchased the barley for the defendant as he said he did, and had it on hand, should resort to the idle ceremony of selling the grain, then buying it back again in a day or two at an advanced price, the grain to be delivered by the purchasers within the month, and repeat this same thing several times. The plaintiff claims that this is an expedient resorted to by the dealers in the Chamber of Commerce, to fix charges for the storage of grain for the month, insurance, interest, etc. This may all be so, but the reason or necessity of doing business that way, instead of doing it in a direct, plain manner, is not obvious. Why it should be necessary to resort to the market reports of the Chamber of Commerce at a particular day, to ascertain the amount of carrying charges, we fail to comprehend. If the transaction was really legitimate, one would naturally suppose that it would be easy to render an account for interest, storage, insurance, etc., according to the facts, than to make such statements as were rendered. But, if the trans-

action was in fact a mere wager or bet upon the rise or fall in the price of barley, then these statements would be the direct way of showing how the deals stood each month. Again, the plaintiff attempted to show what the contract was which he made with the defendant for the purchase and delivery of the grain. Ordinarily, the purchase and sale of a quantity of grain, where the seller holds it for delivery, is not a very complicated matter, or one difficult to be understood. But after carefully reading over more than once the testimony of the plaintiff and his clerk, not a member of the court is certain that he understands how the business was transacted. It is doubtless our fault and want of knowledge as to the method of doing business by the members of the Chamber of Commerce. Be this as it may, the original contract between the parties was not produced on the trial, not being found. But the blank form of a contract, similar to the one which it was claimed was made, was introduced. According to this form the plaintiff sold and agreed to deliver, and the defendant bought and agreed to receive and pay for on delivery, the barley at a stipulated price; the grain to be delivered in warehouse receipts at such times in the month of as the seller might elect. Then comes the provision that the contract is subject to the rules and regulations of the Chamber of Commerce of Milwaukee, which rules and regulations were made a part of the contract. Now, what these rules and regulations are does not appear in the case, and we do not understand they were introduced on the trial, though they were a part of the contract out of which the note originated. We must say there is a mystery about the whole trans-

action which does not usually attend an actual, *bona fide* purchase and sale of property. These fictitious sales and purchases which were resorted to, what do they mean? Were they mere devices to cover up the real nature of the transactions? There are many circumstances that are suspicious, and which tend to sustain the claim of the defendant that the contracts were mere gambling transactions, consequently illegal. The jury might have inferred from all the evidence that the parties never intended or expected that there should be an actual delivery or acceptance of property, but that the whole 'deals' were nothing but wagers or bets on the rise or fall of the price of barley. The case should have been submitted to the jury under proper instructions."

But a case should not be sent to the jury upon evidence of trifling circumstances. In the case of Rumsey *v.* Berry,[1] the court said: "While it might indeed appear a little singular, and even suspicious, that a man residing in Bangor, having no wheat of his own, should undertake to sell wheat in Chicago; still we cannot assume that any one has violated the law, and been guilty of immoral and corrupting practices in his business transactions, without proof, even though he may ask it himself, for the purpose of being absolved from the obligation of a losing contract."

[1] 65 Me. 570.

CHAPTER V.

WAGERS CONSIDERED IN REFERENCE TO BROKERS AND COMMISSION MERCHANTS.

Up to this point we have considered the subject mainly in relation to the principals to the contracts. We now propose to examine it as it affects brokers and commission merchants. Between members of the same exchange the question seldom arises, and if it does, like their other controversies, it is usually settled by arbitration and rarely comes into the courts; but the claim that transactions in the form of purchases and sales made for the account of outside principals by members of exchanges are in fact wagers, is frequently made.

The law governing the relation between principal and agent is well settled; but much confusion has arisen in applying it in cases affecting members of the exchanges, owing largely to the failure to discriminate between the rights of the parties to the contract creating the relation of principal and agent, and the rights of the principals dealing through the broker or commission merchant. Whatever doubt there may be about the accurate statement of the reciprocal rights and duties of principals and brokers or commission merchants, members of exchanges, all of the authorities are agreed that the latter are agents and as such are entitled to indemnity and compensation so long as they act within their instructions, in good faith, and the services they perform are not unlawful.

The author has reduced the law applicable to this subject to the following rules:

Rule I.

WHERE A BROKER OR COMMISSION MERCHANT, IN PURSUANCE OF INSTRUCTIONS FROM HIS PRINCIPAL, BUYS OR SELLS, OR BOTH, FOR FUTURE DELIVERY, AND IN SO DOING MAKES CONTRACTS IN HIS OWN NAME WHICH MAY BE ENFORCED AGAINST HIM, HE IS ENTITLED TO HIS COMMISSIONS AND TO INDEMNITY FOR HIS DISBURSEMENTS, INCLUDING LOSSES PAID, AND MAY MAINTAIN AN ACTION THEREFOR.

There is a distinction between a commission merchant and a broker. The term commission merchant is the modern name for the common law factor, the latter term having gone almost out of use in this country. If there is any distinction between a factor and a commission merchant, it is that the former acts for a foreign principal, and the latter for one in his own country; but the rules of law governing both are the same.

A factor or commission merchant is an agent to whom goods are consigned for sale, or who is authorized to purchase goods for his principal. He is intrusted with the possession, management, control, and disposition of the goods bought or sold. He has a right to conduct his principal's business in his own name, and usually does so. If he wishes to free himself from liability he must disclose the fact that he is dealing as an agent and give the name of his principal; otherwise he will be held to all the responsibilities of a principal.

Without regard, however, to the relations he assumes to third parties he is an agent in respect to his

own principal, and he is bound to obey instructions and to account to him.

A broker stands in a different position. He is not ordinarily intrusted with the possession or control of the goods, and has no interest in them. His only office is to find parties to deal with his principal, and having done this his function ceases. He does not deal in his own name, but acts in the name of his principal.

With these distinctions the rules of law governing the relation of broker and commission merchant with his principal are the same.

The precise relation which members of the different exchanges hold to their principals, has not been fully determined. They are sometimes brokers, sometimes commission merchants, and often both. The courts have imposed obligations, and given rights that are foreign to both characters. In fact the relation is *sui generis.* For the purpose, however, of discussing the question of wager they are either brokers or commission merchants, and the distinction is unimportant, especially as the rules of all the exchanges require them to assume the obligations of principals to each other, and they in turn guarantee to their customers the performance of all contracts made for them.

The test whether a case comes within this rule, is to inquire whether the broker or commission merchant was employed to make real lawful contracts which could be enforced against him, and if he was, he is entitled to indemnity, and it makes no difference what other facts or circumstances were connected with the transactions in which they were engaged.

English Authorities.—The case of Ashton *v.* Dakin[1] is a strong authority for this rule.

In the case of *Ex parte* Godefroi *in re* Hart,[2] there was an application by a stock-broker to have the defendant adjudicated a bankrupt. The debt arose from transactions which the respondent had authorized the petitioner to effect on the Stock Exchange, the money due on such transactions from the respondent having been paid by the petitioner. It was argued on behalf of the respondent that the debt arose out of a gaming contract within the meaning of the statute of Victoria,[3] and therefore not recoverable at common law, or provable in bankruptcy. The chief judge held that the petitioner was merely an agent, and since the respondent must be taken to have known that by the rules of the Stock Exchange the petitioner was bound to pay the members of the same any sums of money which might be due from the respondent to them in regard to the transactions, a request to repay such sums must be implied.

In Cooper *v.* Niel,[4] the defendant employed Bayley, a broker, to enter into contracts upon the Stock Exchange for the purchase of shares. Bayley knew the defendant did not intend to accept the shares, but only to receive or pay the differences according to the rise or fall of the market price of the same, and entered into contracts with jobbers for the purchase of shares in pursuance of the defendant's instructions. Upon these contracts, according to the rules of the Stock Exchange, Bayley became personally liable. He after-

[1] See full statement of the case, *ante*, p. 116.

[2] Weekly Notes, 95 (1870).

[3] 8 & 9 Vict. c. 109, § 18.

[4] 13 Weekly Notes, 128.

wards became insolvent, and the plaintiff, as his trustee, sued on the implied contract of indemnity against the claims of the jobbers. At the trial the jury found that the contracts with the jobbers were mere "time bargains," and judgment was given for the defendant. The court considered the verdict of the jury unsatisfactory, and directed a new trial, on the ground that the jury had found that the contracts made by the broker were "time bargains," and it was doubtful whether such bargains were really made. In the subsequent case of Thacker *v.* Hardy,[1] referring to this case, the court said: "A time bargain merely, because it is one, is not invalid. If a man were to undertake to sell me a crop of apples for next year that is not invalid. But when, by a time bargain, you understand something different in reality from what it purports to be, and that whereas it purports to be an agreement to deliver and sell an article on a particular day, it is really no such agreement, but is an agreement to pay what shall be the difference between the price when the bargain was made and the price at the time they name; such an arrangement is something in the nature of a wager or gaming on the question of what shall be the price. * * * It is obvious that the meaning of a 'time bargain' in that case was not merely a contract for the future delivery of stock to or by the plaintiff, as the case might require, but what the jury meant to find was that the plaintiff had been instructed to make bargains which would make him liable to pay the persons with whom he made the bargain the difference in the price of the stock, according to the rise or

[1] 27 Weekly Reporter, 158; s. c. L. R. 4 Q. B. D. 685.

fall of the market, at a future day, and that he had made such bargains." Lindley, J., said: "What are called time bargains are, in fact, the result of two distinct and perfectly legal bargains, namely, first, a bargain to buy or sell, and, secondly, a subsequent bargain that the first shall not be carried out; and it is only when the first bargain is entered into with the understanding that it is not to be carried out that a time bargain, in the sense of an unenforceable bargain, is entered into. Such bargains are very rare, and this is what I understand the witnesses to mean when they say that there are no such things as time bargains on the Stock Exchange." The case was sent back for a new trial, so that the jury might consider whether the plaintiff was instructed to make "time bargains" in the objectionable sense.

In the case of Thacker *v.* Hardy,[1] this subject was fully discussed. The plaintiff was a stock-broker, and was employed by the defendant to buy and sell stocks upon the London Stock Exchange. The action was brought for plaintiff's commissions and for indemnity for losses paid by him. The defendant pleaded that the claim was founded on wagering transactions, which were illegal at common law, and under the Stat. 8 and 9 Vict. c. 109, § 18. This case with two others of a similar nature were tried together, and Mr. Justice Lindley found the following facts:

"(1) That the defendants are speculators, and that the plaintiff knew them to be so; (2) that the defendants employed the plaintiff to speculate for them on the Stock Exchange; (3) that they knew, or must be taken to have known, that in order to carry out

[1] 27 Weekly Reporter, 158; s. c. L. R. 4 Q. B. D. 685.

their transactions the plaintiff would have to enter into contracts to buy or sell, as the case might be, and, in order to protect himself and the defendants, to enter into other contracts to sell or buy respectively; (4) that there was, in fact, no other way in which the plaintiff could speculate for the defendants as they desired; (5) that the plaintiff did buy and sell accordingly; (6) that the defendants never expected or intended to accept actual delivery of what the plaintiff might buy for them, nor actually to deliver what he might sell for them, and that the plaintiff knew that the defendants never expected or intended so to do; (7) that the defendants nevertheless knew that they incurred the risk of having to accept or deliver, as the case might be, but were content to run the risk in the expectation and hope that the plaintiffs would be able so to arrange matters as to render nothing but differences payable to or by them as the case might be; (8) that unless the plaintiff could arrange matters as expected, the defendants would be wholly unable to pay for that which was bought for them, or deliver what was sold for them, and that the plaintiff knew perfectly well that the defendants would be unable to do so." The court then discussed the question whether, under the statute, or at common law, wagering contracts were illegal, and decided that they were not, but were simply void under the statute; and then proceeds to say, in answer to the argument that a contract which is void and unenforceable cannot be made the foundation of a promise to indemnify, that "it appears sufficient to me to say that an obligation to indemnify is created when one person employs another to do a lawful act, which exposes him to liability, and that in

view of the evidence the defendants did authorize the plaintiff to incur risk by buying and selling as above described." Judgment was given for the plaintiff, and upon appeal these views were fully sustained. Brett, L. J., in the Appellate Court said: "The real grounds of the action of the plaintiff against the defendant are, first of all, to recover commissions for acting as agent of the defendant and in making contracts of purchase and sale for him, and, secondly, for indemnity against the liability that the plaintiff had incurred with the authority, and for the benefit of, the defendant; and Mr. Justice Lindley said that the contracts of the plaintiff and defendant (being one of employment only) was not a contract within the 8 and 9 Vict. c. 109, § 18, and that there was nothing illegal in it, and that, therefore, according to law, the plaintiff is entitled to recover in respect of both claims." Bramwell, L. J., after discussing the question whether a single order to buy or sell includes the right to the services of a broker in making a counter transaction, said: "But I will suppose that that was the bargain between the two parties, and that the principal would have the right to say to the broker, 'the transaction you have entered into is for a purchase, and accordingly I am bound to receive the stock and pay for it; but I call upon you by virtue of the bargain you and I made when I employed you, to sell that stock for me, so that, instead of my taking and paying for it, I shall only have to take or pay the difference.' In my opinion there is nothing in that transaction within the gaming and wagering act, for it is quite clear that even in a bargain like that the principal would have a right to say, 'I will not go on with these speculations, but I

will take the article purchased and hold it as an investment.' I have no doubt that that does continually happen, and that men who have bought with the hope of a rise, intending to sell again, having met with a fall, and have become so disgusted at having to end the matter by reselling, or continuing it on and paying continuations and backwardations as the case might be, that they have under such circumstances found the money and taken the stock and paid for it; and so in that case the transaction comes to this, that the principal has a right to say, 'well, I will take the stock I have bought (if it was a purchase), or deliver the stock' (if it was a sale), or a right to say, 'you must try to end the transaction by buying or selling again.' I say 'try,' for the broker might be unable to do so, and all he would be bound to do would be to endeavor to buy or sell again. What is there illegal in that? I employ you to buy with a right to call on you to sell if it does not suit me to take the article; what gambling or wagering is there between a broker or a jobber in that case? Absolutely none. The broker can say it does not matter to me if the thing goes up or down; but in a case of wagering as to the price of stock it does matter to him. In Grizewood *v.* Blane it mattered to both parties if the thing went up or down, but in the case I put that is not so, and there is no wagering or gaming at all." And Cotton, L. J., said: "First of all, it is not contended that, if these findings are right, there is any ground of appeal. Cooper *v.* Niel, by which we are bound, would prevent another argument of that kind; and I still remain of the opinion expressed by me and the other members of the court in that case. The case came to

this: that the defendant employed the plaintiff as his agent to enter into transactions on the Stock Exchange in respect of which, in accordance with the rules of the Stock Exchange, the plaintiff was liable or compellable to pay the price of the stock to the person with whom he dealt, and though the defendant never intended these transactions, as far as he was concerned, to be bargains for the real purchase or real sale of stock, yet having employed the plaintiff as his agent to enter into transactions, by which the agent incurred liability, he was bound to indemnify him for such liability. * * * The essence of gaming or wagering is that both parties stand to lose or gain on the happening of some event at the time unknown to them, that is to say, if the event is one way A. shall win, and if the other way B. will win; but there is no such element as that here. There will be no such gain to the plaintiff. His gain will not depend on how the difference in price went. If he was to have a commission he would make it either way. If the difference were in favor of the transaction he would not win, and if the difference were against the transaction he would not lose."

In this case the court clearly makes the distinction, which is so often lost sight of, between applying the test to the contracts made by the broker, and the contract between the principal and agent. Lindley, J., said: "But the plaintiff did not agree to buy or sell from or to the defendants, and I have the authority of Lord Justice Brett for saying the statute only affects the contract which makes the bet or wager." And Cotton, L. J., said: "Here the case is not that the plaintiff was a person purporting to sell to or buy

from the defendant, as in Grizewood *v.* Blane; here the material difference is that this plaintiff is purporting to buy for and sell for the defendant."

In the case of *Ex parte* Rogers *in re* Rogers,[1] it appeared that C. T. Evans, a stock-broker in the city of London, was instructed to buy and sell stock and shares for Rogers on the Mining Stock Exchange. The contracts were for the next account day, and were expressly made subject to the rules and regulations of the Stock Exchange, by virtue of which Evans was a principal as between himself and the jobbers with whom he dealt, and was liable to pay differences to them if there was a loss on the transactions, and if on account day the jobbers refused to carry over the transactions to the next account day, they could compel Evans to take delivery of the stock, and if he did not do this he was declared a defaulter on the Stock Exchange. It was understood between Evans and Rogers that the latter was only speculating for the rise of the stocks which he bought, and that he never intended to accept delivery of them, but meant to sell them again before account day, and receive or pay the differences between the prices at which he bought and sold. On the 26th of February, 1880, an account was rendered by Evans to Rogers showing that a balance of £2,275 would be due from him on the following day, which was the account day. On the 27th of February Rogers went to Evans' office just before four o'clock in the afternoon, and gave his note for five hundred pounds. Evans told him he should have to pay the jobbers that afternoon or be declared a defaulter the next day. Rogers said he would have the rest of the

[1] 15 L. R. C. L. Div. 207.

money the next day, and told Evans to get it where he could. Evans accordingly borrowed the money and paid the jobbers. Rogers afterwards paid him five hundred pounds. On a petition to have Rogers declared a bankrupt, because of his failure to pay the amount due to Evans, it was claimed that he had not committed an act of bankruptcy, as the debt arose out of illegal, gambling, and wagering transactions. Collins, L. J., said: "That so far as the point of law is concerned it must be taken to be concluded by Thacker *v.* Hardy. The debt is in respect of sums of money paid by the petitioner for the appellant at his request." And James, L. J., said: "This is the ordinary common case of a broker employed by a person who is speculating on the Stock Exchange, and authorized by his client to pay the losses and actually paying them."

American authorities—Federal decisions.—In the United States courts, Lehmann *v.* Strassberger[1] is a leading case. Lehmann Brothers were cotton factors in the city of New York, and as such were employed by Strassberger of Mobile to buy and sell cotton for future delivery. They had been so employed for several years. It was the understanding between Strassberger and Lehmann Bros., that in all sales or purchases of cotton by them for him there was to be no delivery, but differences should be paid, except when special instructions were given to receive or deliver the cotton. The contracts were made by Lehmann Bros. in the city of New York, according to the rules of the Cotton Exchange in that city. By these rules an actual delivery is provided for, and required in

[1] 2 Woods C. C. 554.

every contract, unless waived in some mode by the subsequent conduct or assent of both parties, or unless the party having the optiou to make or require an actual delivery, fails or declines to exercise his option, or to insist upon delivery. Losses were made and paid by Lehmann Bros., and for the amount of them and plaintiffs' commissions Strassberger gave his note for one thousand dollars, and afterwards verbally and by letter promised to pay the same. The note was not paid, and the question in the case was whether Strassberger had committed an act of bankruptcy in not paying it; he claiming that the note was void because executed and payable in New York, and based on the contracts made there, and that the transactions were wagers under the statutes of that State. Upon this question the court below charged the jury as follows: "If you believe from the testimony that it was never intended there should be an actual delivery of cotton in the future, but the understanding and agreement were, that upon the day the delivery was to be made the person agreeing to sell should pay to the person agreeing to purchase the difference between the price at which the cotton was agreed to be sold and the price current on the day when it was agreed to be delivered, then you will find that the defendant has not committed any bankruptcy." The defendant had a verdict, but upon appeal the judgment was reversed. In discussing the question whether the contracts made by Lehmann Bros. with parties upon the Cotton Exchange in New York were *bona fide*, the court said: "Strassberger testifies, and in this he is uncontradicted, that it was the understanding between him and Lehmann Bros., that in all purchases and sales of cotton

by them for him for future delivery, no cotton should be actually received or delivered, but only the differences paid, except when special instructions were given to receive or deliver cotton; and the record shows that he did, on one or more occasions, elect to deliver cotton. If he reserved the option to receive or deliver, the contract was legal in all respects, even though he might have had a purpose in his own mind not to receive or deliver, and had communicated that purpose to his agents. The question is, did he communicate that purpose to the parties not named, with whom he contracted? There is no evidence that he did. On the face of his contract he binds himself to deliver cotton, and the other party binds himself to receive it. Here is no bet or wager."

In Clarke *v.* Foss,[1] the action was brought by an assignee to set aside and cancel six promissory notes and a mortgage to secure the same, executed by C. B. Stevens & Sons to the defendants, on the ground that they were void, as being given to secure a consideration of certain option contracts, which, it was claimed, were wagering contracts under the Illinois statutes Stevens & Sons were for many years previous merchants and dealers in grain and produce in De Sota, Wisconsin, and had shipped wheat and other grain to the defendants, who were commission merchants at Chicago, and had also from time to time speculated in grain in the Milwaukee market, through the defendants, acting as their factors at that place. In October, 1874, Stevens & Sons ordered the defendants at different times by telegraph to make sales of grain for them upon the Chicago market for November delivery,

[1] 7 Biss. 540.

amounting in the aggregate to seventy thousand bushels of corn and five or ten thousand bushels of wheat. The defendants, upon receiving these orders, went upon the market in Chicago, and executed them by making, as was the custom, contracts generally in writing and in their own names with different parties, and immediately notified Stevens & Sons by telegraph and by letter what they had done, and their acts were fully ratified and approved by them. At about the time, or a little before these contracts matured, as they did on the last day of November, the defendants performed a part of them on behalf of Stevens & Sons by a purchase and actual delivery of the corn to the parties to whom the sales were made. Twenty thousand bushels of corn were actually delivered, and as to ten thousand more there was a delivery of warehouse receipts for that amount. The balance of the grain sold the defendants purchased upon the market of different parties, and had it ready for delivery, and then, finding other parties who had similar deals for November purchases and sales, formed rings or temporary clearing-houses through which, by means of a system of mutual offsets and cancellations that had grown upon the board, the contracts were settled by an adjustment of differences, saving an actual delivery and change of possession. There were losses in these transactions of over one thousand dollars, which the defendants paid. The notes and mortgage in the suit were given for a portion of this and the defendants' commissions. Stevens & Sons expected that the defendants would make the contracts much as they did, in fact, make them, and in about the same manner as they did, take care of them, by a delivery of the grain or by a settle-

ment and adjustment of differences according to the circumstances, and whatever the profits were, Stevens & Sons were to be credited with them, and if there were losses, such losses were to be borne by them. The defendants had no reason to expect that Stevens & Sons had or would obtain the grain to ship to Chicago to fill the orders, but defendants intended, in case Stevens & Sons did not ship the grain, to perform their contracts with the parties with whom they were severally made. The understanding of the other parties to these contracts as to their being performed was the same as that of the defendants, and upon this point the court said: "Supposing it had been the mutual intention of S. D. Foss & Co. and the bankrupts that these contracts were not to be performed, I do not see that that would make them illegal so long as the other party did not participate in that illegal intention. S. D. Foss & Co. and C. B. Stevens & Sons did not constitute the parties to the contract. There was no contract for the sale and delivery of grain made between them. As between them the relation existed of principal and agent. S. D. Foss & Co. made the contract in their own name, but for and in behalf of C. B. Stevens & Sons; and S. D. Foss & Co. and C. B. Stevens & Sons constituted but one party to the contract, whether it be considered as a contract between S. D. Foss & Co. and the parties in Chicago, with whom they dealt, or as a contract between C. B. Stevens & Sons and those same parties. * * * There is no evidence whatever to show that those other parties had any notion or knowledge of this gambling intent. On the contrary, they knew that Foss & Co. were men of high standing and responsibility on the

Board of Trade, and would perform their agreements." Upon this ground, and the fact that the contracts made by Foss & Co. were not of the character prohibited by the Illinois statute, but were contracts where the seller had the option merely to deliver within certain specified limits of time, the action was dismissed.

In Bartlett *v.* Smith,[1] the action was by a commission merchant to recover for losses paid in speculative transactions on the Chamber of Commerce in Milwaukee. The defense was that the transactions made by the plaintiffs were wagers, unlawful and void. The case turned on the character of these transactions; and it was claimed that because the rules of the Chamber of Commerce provided that margins might be required, and upon default in furnishing them, the other party might consider the transaction closed, and proceed against the party in default for the difference between the contract price and the market price at the time the contract was closed, and also because the defendant intended at the time he gave the orders for the contracts not to make or receive delivery of the goods, but sell out before the time for delivery arrived, that they were wagers. But Judge Nelson, who tried the case, said: "If the jury find from the evidence that the defendant requested the plaintiff to purchase or sell the wheat for him for future delivery; and further find from the evidence that the plaintiffs made such purchases, and in so doing entered into the contract read in evidence, and such contract intended the actual delivery of wheat, and subsequently were obliged to pay and did pay losses occasioned by the making of the said contracts; * * * then and un-

[1] 13 Fed. Rep. 263.

der such circumstances the contracts of purchase or sale are not wagering or gambling contracts, although the defendant, at the time he gave the order to buy or sell, had no design, purpose, or intention to either receive or deliver this wheat, but designed and intended merely to sell out before the time of delivery or receipt, and settle or adjust the losses on the mere difference in the market value of the wheat."

In the case of Jackson *v.* Foote,[1] the defendants employed the firm of S. G. Hooker & Co. to buy and sell grain, pork, and lard on the Chicago Board of Trade, under an agreement that the defendant was only to deal in differences, that Hooker & Co. were not to take in or carry the commodity bought, but the defendant was only to pay or receive the difference between the selling and buying or the buying and selling prices of the commodities dealt in. In pursuance of this agreement the defendant from time to time gave orders to Hooker & Co. to buy or sell the commodities on the Board of Trade, and they executed these orders by making the regular option trades, that is, contracts for future delivery where the seller has the option within certain limited times to make delivery. In two or three instances the firm received the goods it had bought and then sold them, charging the defendant interest, storage, etc., incident to such transactions. A settlement was made, and the defendant was found to owe the firm twenty-two thousand dollars, which he paid partly in notes of a third party, the payment of which he guaranteed. Mr. Hooker, one of the firm, explained to Mr. Foote how, by reason of his many customers, some of whom were buyers

[1] 12 Fed. Rep. 37.

and others sellers, he could so manage the defendant's deals so that he need not take any of the commodities bought; and although at the beginning the defendant did not know much as to the mode in which the business was to be conducted, he became very soon fully aware of it. Two of the notes came into the possession of a bank in Chicago, in the regular course of business, and the action was brought by its receiver upon the guaranty of the defendant. The case was decided in favor of the plaintiff on the ground that, even admitting the transactions, as between the defendant and Hooker & Co., were wagers at common law, and so void, defense could not be made to the guaranty in the hands of a *bona fide* holder of the same, but the court said: "It is extremely doubtful in my mind if the suit had been brought by Hooker & Co. against the defendant he could, upon the showing now made upon this trial, have successfully defended against this claim." This case is an extreme illustration of the rule. The agreement made would bring it within Rule IV; yet the fact that the firm made real contracts, and could make no others on the Board of Trade, the knowledge by the defendant of how the deals were really conducted, and his final ratification of them, bring it clearly within this rule.

In Rountree *v.* Smith,[1] the plaintiffs were brokers and members of the Board of Trade of Chicago, and brought their action against the defendant for services rendered and money advanced by them in purchases and sales on the Board of Trade for the defendant. The defense was made that the contracts were bets on the future price of the articles bought

[1] 108 U. S. 269.

and sold. The defendant testified: "I could not say I had any understanding on the subject of the nature and character of the Board of Trade deals, whether the property was to be actually delivered or whether it was to be settled for." The plaintiffs said "that in no instance had they any agreement with the parties to the contracts made by them for Mr. Rountree, that performance was not expected or intended, but a mere adjustment of differences, and they say that actual delivery of the article was made in some of them." The other parties to these contracts were not produced, nor their testimony given, and there was no direct evidence that any of them either bought or sold with any other purpose than to perform the agreements as the terms thereof bound them. Under these circumstances the jury were instructed that there was no evidence in the case to show that the transactions were wagers, and on appeal to the Supreme Court this was held to be correct. It was claimed in this case that a large proportion of all the contracts made for the sale of produce at the Board of Trade of Chicago were settled by the payment of differences, and that nothing else was expected by the parties to them; and the number of these in proportion to *bona fide* contracts in which delivery was expected and desired, is said to be so large as to justify an inference that it was so in these cases. The court, after observing that evidence of what other people intended by other contracts of a similar character, however numerous, is insufficient in itself to prove that the parties to these contracts intended to violate the law, or to justify a jury in such a presumption, said, it is also "to be observed that the plaintiffs in this case are not suing on

these contracts, but for services performed and money advanced for defendant at his request, and though it is possible they might, under some circumstances, be so connected with the immorality of the contract as to be affected by it if proved, they are certainly not in the same position as a party sued for the enforcement of the original agreement."

In the recent case of Irwin *v.* Williar,[1] Mr. Justice Matthews, referring to Thacker *v.* Hardy,[2] said: "There the plaintiff was employed by the defendant as a broker to speculate for him on the Stock Exchange. It was never intended between the parties that the defendant should take up the contracts into which the plaintiff entered on his behalf, but the plaintiff was to arrange matters so that nothing but 'differences' should be actually payable to or by the defendant. The plaintiff having entered into such contracts in the defendant's behalf, in respect of which he became, by the rules of the Stock Exchange, personally liable, he sued the defendant for his commissions and for indemnity against the liability he had incurred. It was held that the agreement between the plaintiff and defendant was not a gaming contract, within the meaning of the statute. The case was distinguished from Grizewood *v.* Blane,[3] which was an action on a contract for the future delivery of railroad shares, in which Jervis, C. J., left it to the jury to say "what was the defendant's intention and what was the plaintiff's intention at the time of making the contracts, whether either party really meant to pur-

[1] 110 U. S. 499.
[2] 27 W. R. 158; s. c. L. R. 4 Q. B. D. 685.
[3] 11 C. B. 526.

chase or sell the shares in question, telling them that if they did not, the contract was, in his opinion, a gambling transaction and void. This ruling was held correct."

The case of Melchert *v.* American Union Telegraph Co.[1] seems to be opposed to this rule.

American authorities—State decisions.—In the case of Brown *v.* Speyers,[2] the plaintiff, a gold-broker, was employed by the defendant to buy and sell gold in New York on commission. The speculation proved unfortunate, resulting in a loss to the defendant of four thousand dollars. In an action to recover a balance of account due the plaintiff from the defendant it was claimed the foundation of the action was a mere wager, and void as such, under the provisions of the Virginia statutes. The court said: "By the very terms of the arrangement, the defendant in error, in buying and selling the gold, could sustain no loss, nor realize any profit from the transaction beyond his commissions, to which he was entitled in any event. Whatever might happen, no damage or benefit could accrue to him from the adventure. If any profit resulted from the speculation, it belonged to the plaintiff in error. If any loss accrued, he was to bear it, and I have yet to see a case in which it has been held that a contract is a wager, by the terms of which the loss and profit were all on one side. Another point relied upon in the argument is, that no sales and purchases of gold were in fact made; and the subject-matter of such pretended purchases and sales had, at the time, no existence, actual or potential; and therefore, ac-

[1] 11 Fed. Rep. 193. See statement of this case, *ante*, page 105.

[2] 20 Gratt. 296.

cording to a well established principle of the law of sales, the contract in relation thereto was void in law. * * * Whether this principle be sound or not, it is unnecessary now to decide. * * * This principle, however, only applies to actions by the vendor against the vendee to recover damages for non-performance of the contracts. It can have no application to a case in which an agency is established, and the agent is authorized to go into the market, purchase the goods, and sell them for the benefit of his principal. * * * As the agent is not permitted to reap any of the profits of his agency, he is entitled to compensation for all expenditures and damage arising in the course of his employment."

In the case of Hatch *v.* Douglas,[1] the facts were those of the ordinary speculation in stocks through a broker. The action was brought to recover a balance resulting from the purchase and sale of stocks by the plaintiffs for the defendant upon margins. The plaintiffs were instructed by the defendant to buy one hundred shares of the Union Pacific stock, which they did, and afterwards sold them out upon his order. The plaintiffs also purchased and sold other stocks. The transaction ended by the defendant neglecting to furnish margins as agreed; and the stocks then on hand were sold out for the account of the defendant, leaving a balance due the plaintiffs. It was claimed that these transactions were wagers, but the court held that they were legal.[2]

In the case of Rumsey *v.* Berry,[3] the plaintiffs, who

[1] 48 Conn. 116.

[2] See this case more fully stated, *ante*, p. 79.

[3] 65 Me. 570. See this case more fully stated, *ante*, p. 212.

were members of the Chicago Board of Trade, were employed by the defendant in the purchase and sale of wheat, and the action was brought to recover the loss incurred on the same. The defendant claimed that the transactions were wagers upon the market price of wheat, principally because he did not have the wheat at the time he sold it, and because he himself said that he was wagering. It appeared that the plaintiffs made real contracts in their own name upon the Chicago Board of Trade. The court said: "We utterly fail to discover any wrong on the part of the plaintiffs. Their business was a legitimate one, and so far as appears, their connection with this transaction was honest. Their profits were not to be affected by the results, their commissions were not to be increased or diminished by any contingency. It is true that they were aware that at the time the defendant had no wheat, but the fact itself being immaterial, their knowledge of it is equally so."

In Sawyer *v.* Taggart,[1] this subject was very elaborately discussed by court and counsel. In that case the plaintiffs, Sawyer, Wallace & Co., were commission merchants in the city of New York, members of the New York Cotton and the New York Produce Exchanges. In December, 1875, Hamilton Bros. & Co., pork packers and merchants in the city of Louisville, Ky., directed Sawyer, Wallace & Co., from time to time, to buy for their account for future delivery certain specified quantities of cotton, pork, and lard. The Hamiltons knew Sawyer, Wallace & Co. were members of the Cotton and Produce Exchanges, and expected the purchases to be made on 'change, subject

[1] 14 Bush, 727.

to the rules and regulations of the trade in New York, and were notified from time to time that purchases had been made as directed. As the time approached when, according to the terms of the contract of pur chase, the goods were deliverable, the Hamiltons directed the purchases to be transferred to subsequent months. This was intended and understood to be a direction to sell the goods, and purchase a like quantity for delivery in the subsequent months specified. The regulations of the exchanges require that all contracts made on the 'change shall be made in the names of members, and the Hamiltons not being members the purchases made for them were made in the name of Sawyer, Wallace & Co., who became liable on the contracts as principals. When they made sales at less than the purchase prices, being bound on the contracts as principals, they advanced and paid the amount necessary to cover the loss, and it is for advances thus made and brokerage and other expenses growing out of these transactions that made up the greater part of the claim sued for. It was claimed in the defense that these transactions were mere illegal wagers on the market price of the cotton, pork, and lard; that it was contemplated by Sawyer, Wallace & Co., Hamilton Bros. & Co., and all connected with such contracts that, when the time came for the delivery of the cotton, pork, and lard, the same should not be delivered to the party so pretending to purchase, but such party should receive or pay, as the case might be, the difference between the market price in New York city at the time of such pretended purchases, and the time for the delivery of such pretended articles, *i. e.*, the difference between the market price and the price on the

day of sale. In each instance when directed to buy, Sawyer, Wallace & Co. went upon the exchange, and there entered into agreements which on their face constituted valid and enforceable contracts, and the names of all the parties with whom contracts were made, were given. All the witnesses for Sawyer, Wallace & Co., who testified from their personal knowledge of the transaction, said that there was no agreement or understanding between Sawyer, Wallace & Co. and the Hamiltons, or between Sawyer, Wallace & Co. and those with whom they made contracts, that the goods should not be delivered and paid for according to the terms of the written contracts, or that the contracts should be settled by the payment of differences. One of the members of the firm of Hamilton Bros. & Co. testified that his firm never intended to receive the goods they directed Sawyer, Wallace & Co. to buy, but they desired to have made on their account contracts which they could enforce if they chose to do so, but their intention was to resell before the time arrived for the delivery; and this intention was known to Sawyer, Wallace & Co. The evidence also shows that before the maturity of each contract the Hamiltons directed the goods contracted for on their account to be sold, and that Sawyer, Wallace & Co. went on 'change and made contracts for the sale, for account of Hamiltons, of goods corresponding in quality and kind with those they had purchased for them, deliverable at corresponding dates, and the names of the persons to whom these sales were made were given in the record. The rules of the exchange, made part of the contract respectively, provide that delivery of goods, sold for future delivery, shall be made in the following

manner: the seller shall give written notice to the buyer that he will deliver on a day named; if the seller has resold the goods he passes his notice to the vendee, and so on until it reaches a vendee who has not sold; the seller must then deliver to the buyer a transferable order or an order on a warehouse or place of delivery before 12 M. of the day preceding that on which the delivery was due; if the buyer has not resold he is bound to present the order and receive and pay for the goods; if he has sold he passes the order to his vendee and so on until it reaches a vendee who has not sold, and he is bound to receive and pay for the goods at the original contract price, the difference between that price and the price of each subsequent sale being settled between the immediate parties to such sales. The rules also provide that delivery orders shall be received by any member of the exchange to whom goods of the kind called for in it are due from another member. It appeared from the case that in every instance notices of delivery and the usual delivery orders were received by Sawyer, Wallace & Co. from the sellers, and were passed by those to whom they had sold for account of Hamiltons. The court said: "Having shown that they entered into contracts valid on their face for the purchase of goods they were directed to buy for Hamiltons, and that, pursuant to the directions, they resold the goods, and delivered to the purchasers from them delivery orders which they had received, and that on such resales there were losses which they had paid, they have made out a clear *prima facie* right to recover." The court then at great length proceeded to consider whether the great variety of facts and circumstances, each of which

was urged to show the contracts made by Sawyer, Wallace & Co. for the Hamiltons were illegal, and held that none of them did. This case is very interesting and instructive, and shows a knowledge of the methods of doing business on the exchanges that is quite refreshing. Many of the points claimed as showing these contracts to be wagers, have been referred to in Chapter III. The court also said: "That no actual delivery was ever made directly to the Hamiltons, or to Sawyer, Wallace & Co., proves nothing. This was not expected or intended, and was not essential to the validity of the contracts. No case has been found in which it has been held that the fact that no delivery was made or intended, was of any importance where it also appeared that the purchaser intended and had resold before the time of the delivery, and thereby procured another to become bound to receive and pay for the goods in his stead. In Smith *v.* Bouvier,[1] the Supreme Court of Pennsylvania defined a gaming contract to be one in which it was agreed or understood in the beginning that the thing dealt in is not intended to be delivered, but the parties are to settle their mutual wagers on the price by paying the difference between sales at different times. There are many other cases in which the same question arose, and they all held substantially the same language, and turn upon the question, whether there was an agreement or understanding, tacit or expressed, between the parties at the time of entering into the contract, that the thing contracted for was not to be delivered and paid for according to the tenor of the contract. We fully concur in the principle upon which these cases were

[1] 70 Pa. St. 325.

decided, but we find in this case no sufficient evidence that any such understanding or agreement existed between the parties as renders the contracts illegal."

In the case of Williams *v.* Carr,[1] the plaintiffs were employed by the defendant's testator in speculating in cotton for future delivery on the New York Cotton Exchange. The testator's interest in these transactions was known to the plaintiffs to be speculative merely, and his purchases were made in the expectation of making profit from an advance in the market value of the cotton. The contracts were made by the plaintiffs through John F. Black, a broker, with McCauley & Co., doing business on the New York Cotton Exchange. The contracts were in writing, and made in the regular and ordinary course of business, subject to the rules and regulations of the exchange. The defense set up was that the contracts were in the nature of wagers or bets on the price of cotton at a given time, and were illegal and void. The court, in speaking of the form of agreement used, said: "The agreement upon its face is fair and reasonable and free from any imputation or taint of illegality. It purports to contain the terms of sale by McCauley & Co. of a specified quantity of cotton deliverable at their option during the month of December on proper notice. It contains no intimation that it can be satisfied otherwise than by a delivery at the time appointed. Looking into the pamphlet which accompanies the case and contains the charter and regulations of the Cotton Exchange, * * * we find nothing inconsistent with entire good faith or casting suspicion upon the integrity of the transaction. * * * There is no fact

[1] 80 N. C. 294.

stated in the case connecting McCauley & Co. with the intestate, and his purpose and expectations in entering into his disastrous speculation in an article so uncertain and variable in market value, and none from which their knowledge of his purposes can be inferred. Both must be privy to and participate in the illegal intent to render the agreement void." Judgment was given for the plaintiff.

In Marshall *v.* Thurston[1] is a good description of what is known as "dealing in futures." It was found by the court, as explained by the witnesses, to "mean that the party buys or sells so much of a given article, in this case bonds of the State of Tennessee, at a given price for delivery at a future day, depositing a 'margin' or sum of money to cover the possible rise or fall in the price of the article. At the expiration of the stipulated term, there is a gain or loss in proportion to the rise or fall in price. Each party may, if there be no agreement to the contrary, demand a performance of the contract by a delivery of the article and payment of the price, although usually, it seems, no delivery is expected, but the transaction is closed by the payment by the loser to the winner of the difference between the price agreed and the actual market price at the time." This does not accurately define contracts for future delivery, but purely speculative contracts of that character are legal, because the right to demand performance is inconsistent with an agreement that there shall be no delivery. The mere hope or expectation of being able to settle by payment of differences cannot make the transactions wagers.

[1] 3 Lea, 741.

In Kent *v.* Miltenberger,[1] we have an American case fully in support of the English case of Thacker *v.* Hardy.[2] The action was brought to recover a sum of money claimed to be due to the plaintiffs from the defendant on account of certain sales of wheat for future delivery, made by the former as brokers for the latter on the floor of the Merchants' Exchange of St. Louis. Both parties were members of the St. Louis Merchants' Exchange, and the plaintiffs, acting as the brokers of the defendant, made contracts in their own name with other members of the exchange, for the sale of wheat for future delivery. The contracts were all made in the same form upon printed blanks used on the exchange for that purpose. One of them, which was put in evidence, will serve as an example of the others:

"GRAIN CONTRACT.

"ST. LOUIS, July 31, 1880.

"We have this day bought of E. A. Kent & Co. five thousand bushels of No. 2 red winter wheat at eighty-eight and three-quarters cents per bushel, to be delivered at seller's option during the month of October, 1880, in regular elevator. This contract is subject in all respects to the rules and regulations of the Merchants' Exchange of the city of St. Louis.

"REDWOOD, CLEARLY & Co."

Similar forms are used on all the produce exchanges in the country, and are, in the slang of that business, known as "option deals," the seller having the option to make delivery of the commodity sold

[1] 13 Mo. App. 503.

[2] 27 W. R. 158; s. c. L. R., 4 Q. B. D. 685.

within certain dates. "Delivery is always contemplated, not as a thing which will necessarily be insisted upon, but as a thing which the purchaser *may* insist upon. It sufficiently appears that this is the one thing which gives vitality to such contracts, and which enables those, who during a particular month are on the successful side of them, to get up what is known as a 'corner.' * * * A very large majority of these transactions are, no doubt, merely speculative, but many of them are actual purchases by manufacturers and exporters." The defendant was not a dealer in grain, and had no wheat to sell in the sense of having it in his actual possession, nor did he desire to buy any in the sense of receiving it in kind; he simply bought and sold through his broker as hundreds do for speculation. The defendant being a member of the exchange, and the contract made subject to the rules of the same, knew they would have to be executed by actual delivery, if delivery should be insisted upon, and he also knew that the plaintiffs, having placed themselves under the rules of the exchange in the position of principals to the other contracting parties, would have to go upon the market and purchase the wheat sold, if the delivery should be demanded. As a matter of fact part of the sales of wheat was actually bought by the plaintiffs, and delivered on the contracts, but as to the remainder the delivery was waived, and the contract settled by the payment of differences. The defendant testified that although the contracts made by the plaintiffs were as before stated, yet his intention was not to buy or sell but to gamble; that is, selling or buying wheat with the expectation of catching an advance or decline in the market price, and

that the plaintiffs knew this was his intention, and made themselves the instruments of carrying out the same. Under these circumstances the defendant asked the court to charge the jury: "That if they believe from the evidence that the defendant, in all the transactions in question, had no expectation or intention of delivering the wheat alleged to be sold by the plaintiffs on his behalf, but only contemplated in such transactions speculative wagers upon the changes in the market prices of wheat, to be settled by the payment of differences only, and that the plaintiffs were at the time of said transactions fully cognizant of and participated in this expectation and intention, and actually abetted with such knowledge such purpose of defendant, then it was immaterial that, as to parts of said transactions plaintiffs made sales to third parties, as agents or brokers, and your verdict must be for the defendant." The court refused to give this instruction, and on appeal it was held no error was committed. The court said: "By holding otherwise we should, in effect, permit the defendant to say: 'The plaintiffs acting as my agents, made certain lawful contracts; they executed and discharged them for me in a lawful manner, and by their doing this I have incurred an indebtedness to them, but I ought not to pay this indebtedness because my intentions were really unlawful, and they knew it.'" What a man may lawfully "do by himself in this respect he may obviously do by the agency of another. He may employ a broker to make the contract for him and to execute it for him, in any manner in which it would be lawful to make and execute it if acting for himself in person. Any man, though not a dealer in wheat, may therefore

employ a broker on exchange to sell wheat for him for delivery at a future time, and to execute the contract for him by purchasing upon the market the wheat for delivery when the time arrives for its delivery, or by settling with the purchaser by the payment of the difference between the contract price and the market price, if the purchaser should waive the execution of the contract by the delivery of the wheat according to its terms. * * * Another point made for the defendant is, that the court erred in ruling that the burden of proof devolved on the defendant to show the interest of the unknown principal parties with whom the plaintiffs dealt in their own names for the defendant. We understand that such is not the law. These contracts were valid, according to their terms, though it was competent to show by extrinsic evidence that they were invalid. They were, therefore, presumptively valid, and the burden of showing their invalidity lay upon the defendant, who attempted to impeach their validity."[1]

The Pennsylvania Cases.—In this State the decisions are so contradictory and peculiar as to require special notice.

In Smith *v.* Bouvier,[2] Smith & Kames, not owning any stock, employed a broker to sell stock for them at a price named, to be delivered at a particular day. At the time of delivery, prices having risen, the broker borrowed stocks to meet the engagement, and afterwards under instructions from Kames bought at

[1] See also Wolcott *v.* Heath, 78 Ill. 433; Williams *v.* Tiedman, 6 Mo. App. 269; Gregory *v.* Wattowa, 58 Iowa, 711; Murry *v.* Ochletree, 59 Iowa, 435; Lowry *v.* Dillman, 18 N. W. R. 4.

[2] 70 Pa. St. 325.

a higher rate to replace the stock borrowed, and brought the action to recover for money laid out and expended. Smith & Kames were to keep a margin of ten per cent. of the par value of the stock in the hands of the broker. The defendant insisted the jury should have been instructed "that all purchases of stocks with a view to resell and make a profit on their rise, or contracts to furnish stocks on time, should be declared to be gambling transactions and illegal, not only between buyer and seller, but as to the brokers and agents through whom the purchases or sales had been made." The court below had instructed the jury "that if the transaction was a speculation founded on a real sale and purchase of stocks by the plaintiffs for the defendant, which were actually sold and bought and delivered, then it was not a gambling transaction, and is not an unlawful contract, or one which the law refuses to recognize as a lawful contract. * * * The distinction is between a real transaction, where stock is actually bought and purchased and delivered, and where the parties agree, from the beginning, that the stock is not to be delivered, but that they are to settle their mutual wagers upon the price by paying the difference between the sales at the different times. That is a distinction which is very easily appreciated." This was held to be correct, and in regard to the instruction claimed by the defendant the court said: "This would make a great inroad into what has, for an indefinite period, been regarded as a legitimate business, and would either destroy it altogether, or, if continued, put the brokers at the mercy of those for whom they transact such business. Let it be understood that a broker has no power to recover either for

advances or commissions, however honestly he may have dealt, and there will be found enough persons whose easy consciences would throw their losses upon the shoulders of those who advanced the money and earned commissions in their service. It would be a very palpable wrong to the brokers who are licensed to do such business, if such were held to be the law. * * * Whether the transactions embraced in this case were *bona fide*, or were merely in a form to cover gambling transactions, after a full explanation of what constituted the true difference in law between them, was left to the jury to say upon the evidence to which class they belonged."

Two years after appeared the case of Maxton *v.* Gheen,[1] an action brought by stock-brokers to recover a balance of account from their principal, arising out of the purchase and sale of stocks. The defense was that the transactions were wagers. The plaintiffs were stock-brokers in Westchester, Pa., and had been employed by the defendant to purchase and sell stocks for him. It appeared that the transactions were "short sales" of stock; but the brokers did not in the first instance know that their principal did not have the stock he sold until he ordered them at the end of the time limited for the delivery to buy the stock to fill the sale. It also appeared that the stocks were sold for the account of the defendant on margins. The defendant requested the court to charge the jury that the plaintiff could not recover on the evidence. The court, however, submitted the question to the jury, who found for the plaintiff. Judge Agnew in affirming the judgment said: "This was not a trans-

[1] 75 Pa. St. 166.

action in stocks by way of margins, settlement of differences, and payment of the gain or loss, without any intention to deliver the stocks. Such transactions are mere wagers. But here the stock was in every instance actually sold and delivered, and the transactions carried into final execution. The plaintiffs, who were the brokers of the defendant, were not even aware that he was selling short until the term of credit was expiring and he bought to fill his sales. It will not do to say, because there is so much gambling in stocks that every sale 'short,' as it is termed, is *ipso facto* a wager. It is evidence it is true, but there must be other facts to characterize the transaction and to show the actual intent of the parties was to wager merely upon the prospective price."

The case of Fareira *v.* Gabell[1] was decided the same year. This was an action on promissory notes executed by the defendant, some of which were given as margins and the others for losses on stock transactions. The facts of the case are very meagrely reported; but it appears by the defendant's testimony that he employed the plaintiff to operate in stocks for him, and that the contracts made through the agency of the plaintiff were simply wagering contracts. The trial judge submitted the question whether the transactions were gambling ones to the jury; but he illustrated the general rule by supposititious cases between two persons dealing directly with each other, and said: "It is, however, contended by the plaintiff's counsel that even if these were gambling operations on Gabell's part, and so understood by Fareira, he should still, in equity and good faith, be paid for the service

[1] 89 Pa. St. 89.

which he rendered as Gabell's agent, and Gabell cannot rely upon a fault which was common to both as a defense; and it is said in support of the proposition, that one who lends money knowing that the borrower intends to gamble with it, may recover it back. This may, perhaps, be true as between such a borrower and lender, but I am clearly of opinion that one who should undertake to bet or wager for another, and advance the money staked, would have no right of action against his principal in the event of loss; and I can see no difference between such a case and that of an agent who renders services and expends money in conducting any other gambling operation." The verdict was for the defendant and upon appeal the judgment was affirmed.

In the same year and published in the same volume appeared the case of North *v.* Phillips.[1] The defendants were stock-brokers in the city of Philadelphia. The plaintiff gave them orders to buy Pennsylvania railroad stock for future delivery on buyer's option. The contract was that the defendants should buy the stock, and that the plaintiff should constantly keep with the defendants a margin of ten per cent. of the par value of the stock. Purchases were made in pursuance of these contracts, and the stock declining, and the plaintiff failing to keep up the agreed margins, the defendants sold the stock. The amount of stock carried for Phillips varied from $20,000 to $178,000. The plaintiff brought an action of *assumpsit* against the defendants for the wrongful sale of the stock, and recovered a verdict for $4,000. Upon appeal the judgment was reversed. The court held that the

[1] 89 Pa. St. 256.

stock, although purchased by the brokers at the request, and for the account of the plaintiff, belonged to the defendants notwithstanding the fact that the plaintiff had testified that he expected to pay for the same and take it up. He said: "I bought this stock for an investment just as I would buy anything else with the expectation of making by the rise. * * * I bought the stock, and I expected to pay for the stock at its maturity." The question whether the purchases were *bona fide* or merely a cover, was left to the jury, who found for the plaintiff. Notwithstanding this Mr. Justice Gordon on appeal decided the question as a matter of law, and said that the "dealings between the parties were in differences and margins, and the purchase and sale of the stock was a mere pretense." Much stress was laid upon the disparity between the plaintiff's wealth and money required to purchase the stock.

In Ruchizky *v.* DeHaven,[1] the plaintiff's son, Joseph Ruchizky, was a minor at the time of the transactions. The defendants were stock-brokers in Philadelphia. Ruchizky in 1875 began dealing in corporation stocks, on margins, through the defendant who acted as his broker, not knowing him to be a minor. Their transactions continued from time to time, and a large amount of stocks were purchased. The defendants received from Ruchizky considerable sums of money and shares of stock, which they applied to the purchases directed, the proceeds of which they paid over to Ruchizky. After a large number of transactions the plaintiff ceased giving orders, and the account was closed, showing an indebtedness by the plaintiff to the defendants.

[1] 97 Pa. St. 202.

The account showed that during the dealings plaintiff had paid the defendants some $4,300 more than he had received from them, making a loss to him of that amount, besides his debt to the defendants. This sum the plaintiff now seeks to recover back from the defendants on the ground of his infancy, and his right to avoid all the transactions referred to. The court below said: "Upon this state of facts the defendants must be regarded as the agents of plaintiff, dealing for him with the other parties to whom they sold, or from whom they bought stocks in the course of the transactions, but as to whom they assumed liability as if they were principals; and the question arises can defendants now, after having assumed obligations towards others which they have discharged by the payment over of the money or the delivery of the stocks, be held answerable to rescind all these completed transactions as between themselves and plaintiff, and thus bear the loss of his speculations? * * * The defendants as brokers were ordered to buy stock; they did so. Then they were ordered to sell, and they did so, and accounted to plaintiff for the proceeds. That was their whole duty, and, having performed it, their connection with the transaction ceased. They were mere conduits to pass money from the hands of plaintiff to those of the other principals in his contracts, and to hold them liable to make good his losses now, after the money has by his direction passed out of their hands, would be to establish a principle that would include every one who, however innocently or ministerially, passed the money of an infant towards its destination. Such a principle would be a shocking violation of natural justice, and be a dangerous conversion of the privilege

of infancy from a shield to a sword." In delivering the opinion of the court on appeal Mr. Justice Gordon said: "When, under the case stated, the court below assumed the defendants must be regarded as the agents of Ruchizky in the buying and selling of stocks, in other words, as the mere hand of or medium through which he acted in transactions with other parties, it committed an error. An assumption of this kind is in the very face of the statement before us; the parties were dealing, not in stocks, but margins, and Ruchizky knew no principals but DeHaven and Townsend. It was with them and no one else he was dealing, and with them alone he had to account." The court concluded that the contracts were gambling transactions, and the plaintiff, being an infant, could recover the money and securities deposited with the brokers as margins. In speaking of the broker's want of knowledge of the infancy of Ruchizky, the court, without any apparent reason therefor, said: "They did not know, because they did not choose to inquire. They were getting his money; and like all other persons employed in unlawful callings, they cared not whether that money came from man, woman, or child—whether their victim was young or old, sane or insane."

The next case is Dickson's Executor *v.* Thomas.[1] This case is quite fully stated on page 167. It is important to add here only that Mr Justice Gordon, in the appellate court, said that the case did not "involve, as the court erroneously imagined, the question of agency, for there were but two parties who were mutually engaged in stock-jobbing, and who were to settle with each other and not with some third party." In

[1] 97 Pa. St. 278.

the report of the case, while it is apparent that the testimony of the plaintiff was very badly given, yet it would hardly justify the statement of the learned judge. The plaintiff testified distinctly that he acted as the agent for Dickson, and if the true character of the clearing-house had been explained this statement of the court could hardly have been possible. The settlements through the clearing-house were necessarily with third parties. Upon the facts of this case, however, as found by Mr. Justice Gordon, the application of the law was undoubtedly correct. He found the transaction, taken as a whole, and the relation of the parties to each other were designed as a cover for an intention to wager, and so the case is like Byers *v.* Beattie.[1]

The latest case is Patterson's Appeal.[2] In this case Patterson and the decedent were jointly interested in stock transactions, and employed as broker one Jones. The operations resulted in a loss, which was paid by Patterson. The decedent gave Patterson a written acknowledgment that his share of the loss was $2,547.76, and a promise to do all in his power to pay the same. The account between Patterson and the decedent showed that the claim was founded on the purchase of Pennsylvania railroad stock, and the broker testified that the account represented actual purchases and sales, the former being at the buyer's option, deliverable at any time within the limit on payment of price; that none of the purchases or sales were in the name of the principal, and that the differences were adjusted through the clearing-house; that the decedent had no means, and that Patterson's re-

[1] *Ante*, p. 59.

[2] 16 Rep. 59.

sources were unknown to him. The auditing judge disallowed the claim, and upon appeal the decree was sustained, the court saying: "We are unable to distinguish this adventure from that class of cases which we have so frequently designated as gambling transactions. The magnitude of the purchases made and the limited amount of money advanced can lead to no other conclusion. The contract is unmistakably stamped with a character which the law designates gambling and will not be enforced."

It is impossible to read these later cases without an expression of wonder that a court whose decisions have been received with such universal approval would have gone so far astray on this subject. It is utterly impossible to reconcile the cases of Smith *v.* Bouvier and Maxton *v.* Gheen with North *v.* Phillips, Ruchizky *v.* De Haven, and Dickson *v.* Thomas. In the latter cases the distinction between gambling and speculation is ignored; facts are found that the evidence does not seem to warrant; brokers who, at least, may be honest are held up to view as no better than thieves; the distinction between void and unlawful contracts is not observed; and finally, the question as to whether a particular transaction constituted a wager is taken from the jury and decided by the court as a matter of law. In all the cases, excepting the last, the actions were brought by brokers to recover for services rendered and disbursements made for their principals, and though the testimony on this point was uncontradicted, yet they were treated as and declared to be principals. The attitude of this State toward the business of stockbrokers has been severely criticised by all the law

writers who have considered it.[1] Pennsylvania stands almost alone in its position regarding this subject; a single case in New Jersey [2] was decided in the same way.[3]

The New Jersey Case.—In the case of Flagg *v.* Baldwin,[4] the action was brought to foreclose a mortgage given by Flagg and his wife, to secure a bond given in settlement of losses incurred by the Flaggs in stock speculations in New York. The defense was that the contracts, out of which the indebtedness arose, were wagers, illegal and void, and that the bond and mortgage were therefore void. The transactions which the parties were engaged in were the ordinary speculations in stock through the respondent, who was a broker and member of the New York Stock Exchange. It appeared that the business was done in the usual and regular way. The court, however, in determining the relation which existed between the parties, ignored the New York decision,[5] and adopted the principles laid down in the later Pennsylvania cases. The judge who presided said: "In the able opinion below, much stress is laid on the fact that the purchases and sales for this account were actually made by respondent. He so testifies, and produces vouchers in corroboration of his statement. That the trans-

[1] Dos Passon on Stock Brokers and Stock Exchanges, 423; Lewis on Stocks, 109; Law of the Produce Exchange, 263; Article of Mr. Justice Briggs, 38; Leg. Int. (Pa.) 116.

[2] Flagg *v.* Baldwin, 38 N. J. Eq. 219. See also Justh *v.* Holliday, 11 Wash. 418.

[3] Possibly the cases cited in Chapter III, in the section commencing on page 183, may be considered as sustaining the same view.

[4] 38 N. J. Eq. 219.

[5] Markham *v.* Jaudon, 41 N. Y. 235.

actions were very large, and upon petty advances, is not sufficient, probably, to permit us to reject this positive statement. But assuming it to be true that respondent actually purchased or sold every share of stock in this account, I am unable to perceive how the circumstance affects the conclusions in this case. If the respondent was a mere agent of the appellant in transactions with third parties, there might be some significance attached to it. But such is not, as we have seen, the real nature of the relation between the parties. They were dealing, as to those transactions, as principals, and it was a matter of indifference whether respondent owned or bought the stock he agreed to carry. The transaction was precisely like that which Judge Woodruff,[1] in the dissenting opinion of Markham *v.* Jaudon, characterize as 'an executory agreement for a pure speculation in the rise and fall of stock, which the broker, on condition of indemnity against loss, agrees to carry through in his own name and on his own means of credit, accounting to him (the customer) for profits, if any, and holding him responsible for the losses.' Such an agreement is, within the principles above referred to, a wager. Nor is the result altered by the fact that the broker has or attempts to retain perfect indemnity against loss on his part. As I interpret the transactions, respondent, in consideration of commissions and interest on the advances, agreed to buy and hold stock in anticipation of a rise; or to sell stock of his own, or borrowed for that purpose, in anticipation of a fall. The agreement required him to pay the profits of the transaction, which would otherwise be his, to the appellants. On the other hand, appellants, in consideration of his thus

[1] 41 N. Y. 235.

carrying the stock bought, or providing the stock sold, agreed that in case of a rise or fall to a certain amount, the stock should be closed out, and the loss, which would otherwise fall on respondent, should be paid by them to him. This bargain contained all the elements of a wager. It is not the less a wager because one of the parties obtained a guaranty for the performance of the bargain by the other party." Considering the question then as between two principal parties, the court examined the case, and came to the conclusion that the transactions in question were wagers, and that the securities given for them were void, saying: "That it never was contemplated, intended, or agreed by either party that the stocks purchased or sold were to become or to be treated as the stocks of appellants. The real contract disclosed by the evidence was to receive and pay differences. All the transactions were upon margins. * * * The certificates of stock were never transferred or delivered to appellants. These enormous transactions were far beyond the ability of appellants at any time, and were known to be so. * * * Under such circumstances, it is idle to pretend that there was or could be any hope or expectation that the appellants were to take or could be required to take this vast amount of stocks. For respondent to have tendered them, and to have demanded payment of them, would have been absurd in the extreme. The whole circumstances show that no such right to tender entered into the transaction. On the contrary, the contract plainly was that if the stocks bought advanced the profits were to be realized by a sale. If they declined, the remedy of the respondent

to save himself was by a sale. The settlement was to be of the profits and losses thus ascertained."

Rule II.

WHERE A BROKER OR COMMISSION MERCHANT IN PURSUANCE OF AUTHORITY MAKES, IN HIS OWN OR HIS PRINCIPAL'S NAME, CONTRACTS WHICH ARE IN FORM FOR THE PURCHASE OR SALE OF STOCKS, SECURITIES, OR COMMODITIES, BUT WHICH ARE, IN FACT, WAGERS UPON THE MARKET PRICE OF THE SAME, HE IS ENTITLED TO RECOVER FROM HIS PRINCIPAL HIS DISBURSEMENTS, INCLUDING LOSSES PAID, AND COMMISSIONS, PROVIDED THE TRANSACTIONS OCCUR AND THE ACTION IS BROUGHT IN ENGLAND OR IN STATES WHERE WAGERS ARE MERELY VOID AND NOT UNLAWFUL.

In considering this and the following rule it is important to distinguish between a contract which is illegal and one that is void. An illegal contract is one which the law prohibits and punishes the parties to by fine, forfeiture, or imprisonment. A void contract is one which the law will not enforce or recognize, and leaves the parties to themselves.

A good illustration of this distinction is to be seen in comparing Sir John Barnard's Act[1] and the Statute of Victoria[2] against wagers. In the former, time bargains in the public funds were prohibited under severe penalties, while, in the latter, all wagers are declared void.

English Authorities.—In the case of Jessopp *v.* Lutwyche,[3] the declaration was for money paid by the plaintiff for the defendant at his request, and one of the pleas was, that the cause of action accrued to the plaintiff under and by virtue of certain contracts by

[1] *Ante*, p. 14. [2] *Ante*, p. 13.
[3] 10 Exch. 614.

way of wagers on the market price of shares of the English and Australian Copper Smelting Company, and that said contracts were void under the Statute of Victoria against wagers. To this plea there was a demurrer, and it was held that the plea was bad because consistent with the claim that the defendant requested the plaintiff to pay the money for him, and in fact it was so paid, in which case the defendant had no defense.

This was followed by the case of Knight *v.* Cambers,[1] in which it was held that it was no defense to an action for money paid in respect of losses on wagering contracts that they were made void by the Statute of Victoria against wagers. To a declaration on the common counts it was pleaded that a portion of the claim of the plaintiff arose as follows: the plaintiff, in behalf of persons to the defendant unknown, made with the defendant certain pretended contracts for the sale of shares in the Crystal Palace Co., which contracts were wagers upon the market price of said shares; it being understood that the pretended sales should be settled upon the payment of differences between the price and value thereof on the days on which the said wagering contracts were made, and the price or market value thereof on the day of settlement, and that the money mentioned in the plea was paid by the plaintiff in respect of said differences and not otherwise. The court said: "That reduced it to a wager. Suppose it were so, the defendant asks the plaintiff to pay the money for him. In that case no doubt he would be liable." And to the same effect is Knight *v.* Fitch.[2]

[1] 15 C. B. 562.

[2] 15 C. B. 566.

In Lyne *v.* Siesfield,[1] an action was brought for money paid, work done, and for brokerage and commissions. It was stated in the plea "that the monies in the declaration mentioned were paid and the work done and the brokerage and commissions thereon were so respectively paid, done, and became payable for and in respect, and on account of certain differences and monies which the plaintiffs as the defendant's brokers and agents in that behalf, unlawfully contracted and agreed with divers persons to pay for and on account of the defendant, upon, for, and on account of and in respect of certain unlawful contracts and agreements, made and entered into by the plaintiffs as agents and brokers of the defendant in that behalf, on his account, by way of gaming and wagering, and in the nature of wagers touching and relating to the public funds, public stock, joint stock, and other public securities of England, and to railways and shares in railways in the Kingdom of Great Britain and Ireland, and to the then present and future price thereof respectively, and in lieu of and instead of making, accepting, and paying for the transfers thereof, by, to, and from the defendant, contrary to the Statutes of 7 Geo. c. 8, and also contrary to the Statutes of 8 and 9 Victoria, c. 109, and also that the said contracts were illegal." The jury rendered a verdict for the defendant, but the court ordered judgment for the plaintiff notwithstanding, and said: "We are of the opinion that the plea is bad. The causes of action to which it is pleaded is founded upon distinct considerations. To show that one is illegal does not afford an answer to the whole of that to which the plea is pleaded."

[1] 1 N. & H. 278.

The leading English case in support of this rule is Rosewarne *v.* Billing.[1] This was an action brought by a mining share agent to recover losses found due on an account stated. The plea was that, after the passing and coming into operation of the Stat. 8 and 9 Vict., which made all wagers void, the defendant retained and employed the plaintiff to make, and to enter into on behalf of the defendant, wagering contracts in relation to the market price of certain mining shares. That the plaintiff then, in pursuance thereof, made with persons unknown to the defendant certain contracts which were in form for the purchase and sale of mining shares, but were in fact mere wagers on the rise and fall of the market price. That it was never intended that any shares should be actually bought by the defendant, or sold, or delivered, by any one in pursuance of the wagering contracts so made, but they should be settled by the payment of differences. It was alleged in the plea that according to the custom of the mining share agents the contracts were made in the name of the plaintiff without disclosing that of the defendants. To this plea there was a demurrer on the ground that the said contracts are not illegal, and that the said plea does not aver that the defendant did not request the plaintiff to pay the money claimed.

Here we have, then, a case of an agent employed to make and execute wagers, and the question presented whether he can recover for losses which he paid. In the opinion Earle, C. J., says: "The law as to gaming contracts is, that all such contracts are null and void, and no action can be maintained upon them. But they are not therefore illegal. The parties making

[1] 15 C. B. (N. S.), 316.

them are not liable to any actions or any penalties. Here, the plaintiff paid the differences according to the result, and at the defendant's request. I am clearly of opinion, that, if a man loses a wager, and gets another to pay the money for him, an action lies for the recovery of the money so paid." This case was approved in Thacker *v.* Hardy.[1]

American authorities—Federal decisions.—The case of Lehmann *v.* Strassberger[2] is a strong authority for this rule. The court said: "Let it be conceded, that contracts for future delivery of cotton, when it is agreed there shall be no delivery, but that the differences shall be paid, are wagering contracts, and void as between the parties. That is not the case shown by the record here. The parties here are not parties to any contract for the sale or delivery of cotton. Lehmann Bros., so far as appears from the record, never at any time sold to or bought from Strassberger a pound of cotton. The parties with whom Strassberger contracted were persons other than Lehmann Bros., whose names are not disclosed. Lehmann Bros. were only factors of Strassberger to make contracts with other parties. When, therefore, they sue Strassberger to recover money paid by them for him, on such contracts, and their compensation for their services, the court is not called upon to enforce a contract against the law between the parties to the contract, but simply to enforce the collection of a note, the consideration of which is money advanced and services performed by agents for their principal. If Strass-

[1] 27 W. R. 158; s. c. L. R. 4 Q. B. D. 485.

[2] 2 Woods C. C. 554.

berger were suing the parties with whom he contracted, either to buy or sell cotton for the difference between the contract and the market price, then the case would approach more nearly to what is forbidden by the New York statute. This is the case, to put it into the strongest light for the defendant, of an agent who advances money to his principal to pay losses incurred in an illegal transaction, and takes his note for the money so advanced. In such a case, the contract between the principal and agent, made after the illegal transactions are closed, although it may spring from them and be the result of them, is a binding contract."

The language of the court in the case of *In re* Green,[1] referring to the case of Rosewarne *v.* Billing, would seem to indicate that this rule was not the law in this country; but that case was governed by the Statute of Wisconsin; and in the subsequent case of the Third National Bank *v.* Harrison[2] the court, in referring to this precise point, said, it is to be observed that the court in that case "based its decision mainly on a statute of Wisconsin, which declared 'all notes and agreements *void* that had been given for repaying any money knowingly advanced for any betting and gaming at the time of such betting or gaming.' And the evidence in the case cited showed that the broker not only made the illegal contracts in question, but that he advanced the money for the venture. The court accordingly held that the case fell within the statute, and the broker could not recover money thus knowingly advanced in the furtherance of a gambling transaction."

In the case of the Third National Bank *v.* Harri-

[1] 7 Biss. 338.

[2] 10 Fed. Rep. 243.

son,[1] the action was based on promissory notes made by the defendant to the order of Alexander, and endorsed and delivered by Alexander to the plaintiff. The notes were "given for balances on an 'option deal' —an illegal contract, being a mere betting transaction on future prices, with no purpose of delivering or receiving the articles concerning which the bet was made." It was held that an "option deal" was not a gaming or gambling device within the Missouri statute. But being *contra bonos mores*, the notes could not be enforced between the original parties. It was held, however, that, as the bank was a *bona fide* holder of the notes, it could recover. This was all that was necessary to a decision of the case; but the court, in considering the question whether the notes as between the original parties were valid, cited at length from the manuscript opinion of Judge Thayer in the Tinsley case, who said: "There is an apparent conflict of opinion touching the question whether a broker, factor, or commission merchant, who had been employed by his principal to make contracts of this character with some third party, and had done so in his own name, but for his principal's benefit, may maintain an action against his principal to recover money expended for his principal at his principal's request in the settlement of losses accruing under such contracts. * * * There are * * * cases, arising between factors and brokers and their principals, which the courts have apparently treated as though the action was between the principals to the illegal transaction. But the different relation existing between the agent and his principal, in action by the former to recover moneys

[1] 10 Fed. Rep. 243.

expended for his principal in the settlement of losses on wager contracts, was apparently not called to the attention of the court. * * * The law is well settled in England that if a broker be employed to make wager contracts, such as are voidable under 8 and 9 Vict. c. 109, § 18, and at the request of his principal the broker pays the amount due under such contract, he can recover the amount so paid from his principal, and the illegal nature of the contract with reference to which the money is paid is no defense to an action founded on such claim. * * * In this country the same doctrine has been substantially held. * * * The rule which has the support of a great weight of authority (whatever may be thought of the policy and morality of the rule) seems to be as follows: if a factor, broker, or commission merchant be employed by his principal to buy or sell commodities for the purpose of speculating on the rise and fall of prices merely, and the agent buys or sells in his own name, but on his principal's account, and subsequently, after losses have occurred in such transactions, the agent advances money at his principal's request to pay such losses; or if the agent pay such losses and the principal afterwards executes notes in the agent's favor to cover the amounts so advanced, the agent may recover against his principal the advances so made at his request, or upon the notes so executed, notwithstanding the illegal character of the original venture. The promise implied in the one instance and expressed in the other is neither void for want of consideration nor tainted with illegality. * * * But, on the other hand, if a broker or factor supplied his principal with funds for the express purpose of enabling him to en-

gage in illegal transactions, and if he (the agent) conducts the illegal ventures in his own name, it seems clear that he becomes a *particeps criminis*, and the law will not aid him to recover moneys advanced for such purpose, nor will it enforce securities taken therefor." This statement of the law is exact and unexceptionable; and yet the opinion taken as a whole seems to assert an entirely new principle, and qualify the rule we are considering by confining its application to cases where the money was advanced after the losses had been made, and where the agent had not been actually engaged except to make the contract for his principal and paid the losses at his request. It had been determined that the contracts in question did not come within the Missouri statute against gaming, but that they were void because *contra bonos mores*, and the point decided in the case itself was that the notes in the hands of a *bona fide* holder were good; and yet the court, referring to the quotation from Judge Thayer's opinion, proceeded to say: "The facts proven in the case at bar seem to bring the case within the principle last stated. The original notes involved in this controversy, of which those in suit were mere renewals, were not given after the various contracts had been settled, to cover losses which the agent had paid for his principal. The notes seem to have been drawn by the principal in favor of the agent at the inception of the alleged illegal ventures, or within a few days thereafter, while the transactions were still pending and the result undetermined. They were either given to secure moneys advanced by the broker to his principal, to enable the latter to prosecute the ventures, or they were given as an indemnity to the broker, to shield him from losses

that he might sustain while carrying out the alleged illegal ventures in his own name, but on his principal's account. In either event, it would follow that the agent could not recover on these notes as against his principal, the maker of the notes, if the contracts or 'deals,' as they are termed, were mere wagers on the fluctuations in the market price of grain, and for that reason unlawful. Obligations thus intimately connected with an illegal transaction, and furnishing an inducement to the same, could not be supported as between the original parties, nor could they be enforced by the present plaintiff if it took the same with knowledge of its infirmity."

This limitation of the right of the agent to recover is not supported by any other authority,[1] and is believed to be wrong on principle. The error arises from the misuse of the word illegal, and confounding it with the word void. Whether an agent can recover for his services or advances depends not upon the question when he paid, or agreed to pay the money, but upon the character of the transactions in which he is engaged. If they are unlawful he cannot recover, as appears by all the authorities cited in the next rule. All unlawful contracts are void; but all void contracts are not unlawful, and it is improper to use the expression "*in pari delicto*" as applied to the acts of an agent in reference to contracts he makes for his principal, which the law will simply not enforce; and it is inconsistent to say that an agent may make a wager for his principal, and if after the loss is made, pays it, he may recover, and also say that a promise in the be-

[1] But see McLean *v.* Stuve, 15 Mo. App. 317; and Ream *v.* Hamilton, 15 Mo. App. 377.

ginning to pay whatever loss may occur and be paid by the agent cannot be enforced. It has been said, it is true, in some of the cases, that the money having been paid after the transactions were ended, the agent can recover it, but there is no case known to the author where the *time* of the promise to reimburse an agent engaged in making wagers which were simply void was considered material.

In Jackson *v.* Foote,[1] it appeared that Hooker & Co. were employed by the defendant to buy and sell grain, pork, and lard for future delivery on the Chicago Board of Trade for the defendant's account, under an agreement that Hooker & Co. were not to take in or carry the commodities bought, but defendant was only to pay or receive the differences between the selling and buying, or buying and selling prices of the commodities dealt in. The transactions, when closed, showed a balance of $22,000 against the defendant, in settlement of which they gave Hooker & Co. four notes of the Couch estate for $5,000 each, the payment of which the defendant guaranteed. Two of these notes were transferred to the Third National Bank as security for a loan made to Hooker & Co., upon which were the written guarantees of the defendant. The receiver of the bank brought action upon these guarantees, and the defense made was that the transactions between Hooker & Co. were option contracts and prohibited by the statute of Illinois. The court held, however, that the transactions were not of this character, and said, at most, they were transactions where it was not intended any commodity should be actually received or delivered, but they were to deal in differ-

[1] 12 Fed. Rep. 37.

ences only, and that such transactions were wagers at common law. The court said: "Assuming then, that the defendant, by his agreement with Hooker & Co., intended to deal only in differences, and that the bulk of the debt against him on the books of the firm accrued for differences paid by the firm on the trades made for him in pursuance of this agreement, the only question is, do these facts so taint the paper as to make this guaranty thereon void in the hands of this bank? There is no dispute but that the bank is a *bona fide* holder of these notes with defendant's guaranty thereon, taken for value before due and without notice of any defense. * * * They may have been, as I have already said, gambling or wager contracts at common law, to such an extent that if Hooker & Co. had sued the defendant he could have successfully defended; but the common law will not help either party to the gambling contract; it simply leaves them where it found them. * * * It seems to me to follow, then, as a necessary conclusion, that the defendant, having delivered these notes with his guaranty on them to Hooker & Co. in settlement of their demand against him, even though their demand was tainted as a gambling claim at common law, he cannot be allowed to set up the illegality of the dealings between himself and Hooker & Co. as a defense to these guarantees in the hands of a *bona fide* holder." It is true that in this case there is one element not stated in the rule; the notes had been passed one step beyond the brokers, but it is thought this makes no difference, as if the consideration of the notes had been illegal they would have been void in the hands of all parties. Indeed the court said: "It is extremely doubtful in my mind, even if suit had been

brought by Hooker & Co. against the defendant, he could, upon the showing now made upon this trial, have successfully defended against this claim."

American authorities—State decisions.—In Wyman *v.* Fiske,[1] the mutual accounts of the parties were referred to an auditor, and in respect of one item it was proved: that one Wheelock, a broker, contracted to sell on time for the plaintiff certain stocks which he did not own, and of which he had no control; that Wheelock purchased other stocks in order to fulfill this contract; that this transaction resulted in a loss, and the defendant, knowing the facts, paid this sum to Wheelock for the defendant and took his note therefor. The plaintiff contended that this transaction was in violation of the Massachusetts statute which provided in substance, that all contracts for the sale or transfer of stock shall be absolutely void, unless the party contracting to sell or transfer is, at the time of making the contract, the owner or assignee of the stock, or authorized by the owner or assignee or his agent to make the sale. The auditor allowed the credit to the defendant, and on appeal the court said: "The statute does not make the act penal. * * * It merely denies to the parties all legal aid in enforcing such contracts; and this places them on similar grounds with oral agreements that are within the Statute of Frauds. It is not criminal to make them; they are merely deprived of legal validity. It is clear that the plaintiff's contract, which he made through his broker, Wheelock, was within that statute. * * * If the plaintiff chose to reimburse him, he had a legal right

[1] 85 Mass. 234.

to do so. The payment would at least be legal as a gift; and the plaintiff, having a legal right to make voluntary payment, had a right to procure a third person to make it, and such payment would be a valid consideration for a note. The note in question has such a consideration, and is therefore valid, and the auditor properly allowed it." Even if the statute made short sales unlawful, the money having been lent to pay the loss after the transaction had been completed, the claim should have been allowed, under Rule VI, unless the statute also made such payment itself unlawful.

In Durant *v.* Burt,[1] the defendant, who was a stock-broker in Boston, requested the plaintiffs, who were also stock-brokers and members of the Stock Board in Boston, to buy for him a hundred shares of the Hancock Mining Co., to be delivered at buyer's option in ten days. The plaintiffs purchased the shares on the board from one Gilley, also a member of the Stock Board, notified the defendant that he had done so, and the latter signified his assent. Before the end of ten days the stock declined in price, and the plaintiffs notified the defendant that he required a margin, which the defendant did not furnish, but said it was all right. Subsequently the plaintiffs received and paid for the stock, and notified the defendant that they should sell the stock if he did not pay for it. This the defendant never did, and finally the plaintiffs sold the stock for twenty-one hundred dollars, and brought this action for the difference with interest and brokerage. The Massachusetts statutes provide that a contract for the sale of stock where the seller does not

[1] 98 Mass. 161.

own it, or is authorized to transfer it at the time the sale is made, is void; in other words, "short sales" are not allowed. The point chiefly insisted upon was that the bargain made for the stock could not be enforced because it was not shown that it was owned by the party who agreed to deliver it, or that he was authorized to sell it; and that no facts were shown proving that the requirements of the Statute of Frauds in making the sales had been complied with. There was no evidence otherwise than by inference from the relation of the parties and their previous transactions with each other of a similar description, and the fact of the transaction being at the brokers' board, whether or not Gilley was on the 29th of August owner or assignee of any stock in the Hancock Mining Co., or agent to sell or transfer a certificate or other evidence of any shares therein, or that the defendant up to the time of the sale of said stock knew who was the owner or whether or not Gilley had or could give any valid title to the stock. The court on this point said: "The case of Stebbins *v.* Leowolf, 3 Cush. 137, decides that a vendor seeking to enforce a contract for the sale of stock must show that he owned it when he made the bargain. But this doctrine has no application to a case like the present, in which an agent has paid money for his principal and seeks reimbursement. * * * The evidence tended to show that the plaintiffs made a bargain for the stock, by the defendant's request, and just such an one as he authorized; that the defendant was notified of the fact and the terms of the purchase, and signified his assent thereto; that, before the ten days of credit expired, the plaintiffs requested the defendant to advance money, called a 'margin' to secure them against loss

by the fall in the market value of the stock, and the defendant said 'it would be all right.'" The charge to the jury on the trial below was "that if the jury shall be satisfied that the plaintiffs purchased this stock as they allege, at the request, upon the terms requested, and for the account of the defendant, notified him that they had so done and the terms, and the defendant assented thereto, afterwards carried the stock at the defendant's request, until the defendant had notice from the vendor that it must be sold, and then, at the defendant's request, express or implied, took and paid for the stock, they should render a verdict for the amount paid, with interest, less the net proceeds of a sale which was made without any unreasonable delay after the refusal of the defendant." And this was sustained as correct.

In Warren *v.* Hewitt,[1] Hewitt brought an action to recover two thousand dollars on a due bill for money loaned, and two thousand dollars paid to Warren, Lane & Co., to invest in cotton for Hewitt. A set-off was claimed which originated as follows: in December, 1868, Hewitt employed Warren, Lane & Co. as factors and cotton brokers to purchase two hundred bales of cotton to be delivered in April following at seller's option. He placed two thousand dollars in their hands as a margin. The cotton was bought in Baltimore through, and the margin deposited with, a commercial house of that city. The purchase was made December 29. In February the Baltimore house notified Warren, Lane & Co. that, owing to a decline in cotton, the margins were exhausted, and called for further margin. Warren, Lane & Co. tele-

[1] 45 Geo. 501.

graphed it would be made good without seeing Hewitt, though the next day they saw him, and told him what they had done, and they afterwards sent to the Baltimore house two thousand dollars additional margin. In March, the market still declining, the Baltimore house, by telegraph, required more margin. They notified Hewitt, and he declined to have any more to do with the transaction. The cotton was then sold at a loss of about four thousand two hundred dollars, the balance of which Warren, Lane & Co. paid, and this sum, together with the two thousand dollars sent forward in February, they pleaded as a set-off to the due bill, and asked to recover the balance. The jury gave a verdict of two thousand dollars for Hewitt, and cancelled the claim against him. A statute of Georgia provides that "a contract for the sale of goods to be delivered at a future day, when both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law and can be enforced by neither party." The court below charged the jury as follows: "If, after you have considered the evidence, you shall be of the opinion that this is a contract for the future delivery of cotton or not, at option of the seller, it is contrary to public policy and cannot be enforced in the courts; therefore, if the defendants have advanced money for such a purpose, it cannot be recovered, neither can the plaintiff recover back from the defendants any sum advanced by him for such a purpose, if invested as requested. If the party selling may or may not deliver, but settle the differences, it is nothing more or

less than betting on the price of cotton, at a given time in the future, and must, at least, be a pure speculation on chances, and, therefore, contrary to the law. If, then, in pursuance of the contract made between Hewitt and Warren, Lane & Co., in December, 1867, Warren, Lane & Co. purchased in Baltimore, through Smith & Co. two hundred bales of cotton for future delivery in April, at the option of the seller, it is a contract against the policy of the law, and cannot be enforced, or any portion of it, by either party, and the sum advanced by defendants, or commissions claimed for the same, cannot be allowed." On appeal the court said: "The judge, in his charge to the jury, and in his judgment refusing a new trial, treats Warren, Lane & Co. as a principal party to the transaction, and as selling cotton to Hewitt. This error is fundamental. The evidence shows that they only acted as his agents in effecting the purchase in Baltimore. The transaction for the purchase of the cotton was clearly as indicated in Section 5996 of the Code, and would not have been enforced, as between Hewitt and the seller, in favor of either party. But where the transaction had been completed, and Warren, Lane & Co. seek to recover advances made by them in good faith, as the agents of Hewitt, which advances were authorized or ratified by him, we think they are entitled to do so. Had a profit been made on the transaction, and had such profit come into the hands of Warren, Lane & Co., as it would have done, the authorities are clear that Hewitt could have compelled them to pay it over to him. A parol contract for the sale of lands will not be enforced, as against public policy, but no one ever thought of calling such a contract illegal. Money loaned to pay for lands so contracted for could cer-

tainly be recovered, though the lender knew the purpose for which it was borrowed. It is true, where a statute makes the payment of money on a certain class of contracts an *unlawful act* and *attaches a penalty thereto*, the Court of King's Bench have decided that money lent to make such payments, with knowledge of the purpose on the part of the lender, cannot be recovered (Cannon *v.* Bryce, 3 B. & A. 179). But the court is careful to draw the distinction between the statute then under consideration, which 'absolutely prohibited the payment of money,' and the statute against gaming, which contains no prohibition against the payment of money lost at play. And hence, money loaned to pay a debt of this latter class has been held to be recoverable. The distinction is, perhaps, narrow, but it is fully supported by the authorities." And in conclusion the court said the question to be left with the jury is, "whether Hewitt authorized or ratified the action of his agents in making the advances, and if he did, they were entitled to have their set-off allowed to the extent of the authority given and the ratification." This case and the principle involved was distinctly approved in other Georgia cases,[1] though in the case of Cunningham *v.* The National Bank of Augusta,[2] the court used the following language: "While it is true that this court has decided that an agent may recover from his principal moneys expended in the purchase of cotton futures for him at his instance and request, it will be observed that the present case does not involve the principle so decided. We are not prepared to say that we will be bound in the

[1] See 45 Ga. 591; 59 *ib.* 26; 64 *ib.* 184; 71 *ib.* 400.
[2] 71 Ga. 400.

future by the decisions last referred to, when the same are reviewed as the law directs, or what our judgment may be upon such consideration."

In William, Black & Co. *v.* Carr,[1] a note was given for losses paid, and charges and expenses, in cotton speculations carried on by the plaintiffs for the defendant's intestate on the New York Cotton Exchange. The court, after deciding the case on the ground that the contracts made by the plaintiffs for the intestate were in no way impeached or shown to be wagers, said: "But there is another view of the case to be taken. The original transactions were closed and settled. The plaintiffs were not the vendors, but acted for the intestate in making the purchases. By the direction of the intestate they have paid his losses and exonerated him therefrom. He has recognized his liabilities and given his note for a large part of them, and the residue has been since incurred and discharged by the plaintiffs. These constitute the claim in suit. If the original contracts could have been avoided because opposed to public policy, the intestate was not bound to set up the defense. If they were unlawful and incapable of being enforced, the payment by the intestate, or by any one at his instance and for him, was not illegal. The borrowing of money for this purpose will not invalidate the contract of lending. It is not illegal to pay a debt which could not have been recovered, nor to advance money to the debtor to be so applied. In Warren, Lane & Co. *v.* Hewitt, 45 Ga. 501, this very question came before the court on a transaction very similar to the one before us, and it was held that money paid on an illegal contract negotiated by

[1] 80 N. C. 294.

the plaintiffs is recoverable. The proper rule is there stated thus: 'When the transaction had been completed and the plaintiffs seek to recover advances made by them in good faith as the agents of the defendant, which advances were authorized or ratified by him, we think they are entitled to do so.' * * * The illegality which vitiates must be inherent in the contract, or the taint pass into the renewal, but does not reach the contract for borrowed money to pay the illegal debt." It is to be observed that the word illegal, as here used, has the sense of not being enforceable, rather than prohibited. There is no statute in North Carolina prohibiting wagers; and the Georgia statute makes dealings in futures only void.

In the case of Marshall *v.* Thurston,[1] the People's Bank was engaged in buying and selling Tennessee bonds for Marshall, and when the transaction was closed the latter gave the bank three notes for eight hundred and sixty dollars each, to recover which the action was brought by Thurston as the assignee of the bank. The defendant claimed that the transactions were wagers, and that he dealt with the bank as a principal, and at any rate if the bank acted as agent it was with full knowledge that the transactions were not real, but were wagers, and that the bank advanced the money to enable the defendant to engage in such transactions. Upon the last claim the judge below charged the jury: "That if you find that the relation between the defendant and the bank was that of principal and agent, and that defendant was the principal, and employed the bank as his agent and

[1] 3 Lea, 741.

broker to effect sales of Tennessee bonds on his behalf with parties in New York or elsewhere, although it may have been the intention of defendant and the party in New York that no bonds should pass or change hands, but on the contracts the differences between the contract price and the market price of the bonds at the date fixed for executing the contract, should be paid by the one or other as they should happen to lose; in other words, although the contract between the principals may have been a pure speculation in the rise and fall of prices, and therefore illegal and void, yet if, under such a contract, the defendant sustained losses, and the People's Bank, at his request, paid the amount of such loss, or if the bank paid such losses without being requested, and defendant afterwards ratified their action, and gave his notes for the amounts so paid, such amount can be recovered of him in this action. * * * If the People's Bank furnished defendant with money for the purpose of enabling him to engage in an unlawful undertaking, it could not recover of him the amount so furnished." On appeal the court said: "We understand the charge to be in substance that if the bank knowingly assisted the defendant by an advance of money and active agency, though not as principal, to gamble on the rise and fall of bonds, no recovery can be had; but if the bank merely acted as his agents in effecting contracts between him and third parties for the sale or purchase of bonds on time, the defendant and third persons intending to speculate on the rise and fall of prices, and defendant suffered losses which were paid by the bank, and these payments were made at his request, or subsequently ratified by him by the execution of his notes

for the amount, a recovery could be had. In this view the charge seems to be in accordance with the authorities, and is certainly unexceptionable." It is not quite clear that this case is an authority for this rule. Its language makes its place under the following rule, although there is no statute in Tennessee making wagers unlawful. There is, however, a statute which makes a party bringing an action upon a wagering contract liable to a penalty, and every one who negotiates a negotiable instrument founded on a wagering consideration without giving notice of its character, is guilty of a misdemeanor.

Rule III.

Where a broker, commission merchant, or other agent in pursuance of authority makes contracts with others, in his own name, or in the name of his principal, which are in form for the purchase or sale of stocks, securities, or commodities, but are in fact wagers upon the market price of the same, and makes disbursements or pays losses in pursuance thereof, he cannot recover the money paid, or his commissions in a state where wagers are illegal and prohibited by law.

This rule is deduced from the general rule, that an agent employed in an unlawful undertaking cannot recover for his services or for money advanced in furtherance of the same.

English authorities.—In England, under the present statute of Victoria,[1] wagers are not unlawful, and so in all cases there where an agent makes wagering contracts for his principal, he can recover; but by Sir John Barnard's act,[2] stock jobbing and the payment of

[1] *Ante*, p. 13. [2] *Ante*, p. 14.

or compounding differences were made illegal. There are some English authorities in addition to those cited under Rule II supporting this rule.

In Cannon *v.* Bryce,[1] it was decided that money lent and applied by the borrower for the express purpose of settling losses on illegal stock jobbing transactions, to which the lender was not a party, cannot be recovered back by him. One Amos made losses in stock jobbing, and was unable to pay them. The defendant loaned Amos money for the purpose of paying such losses, and it was used for that purpose. In consideration of this, Southerland, who was a partner of Amos in other business, joined him in a bond to the defendant. The condition of the bond was not fulfilled. Southerland committed an act of bankruptcy and went to America, and during his absence Amos assigned to the defendant three cargoes, two shipped on account of the firm, and one on account of Amos individually. Amos then committed an act of bankruptcy. The defendant received the proceeds of the assigned cargoes, and this action was brought by the assignees of Amos and Southerland to recover them. It was held that the loan was unlawful, and that the assignees were entitled to the proceeds of the cargoes. The case turned upon the following section of Sir John Barnard's act: "That no money or other consideration whatsoever shall be voluntarily given, paid, had, or received, for the compounding, satisfying, or making up any differences for not delivering, transferring, having, or receiving any public stock, etc." A penalty of one hundred pounds was provided for the violation of this section. It thus appeared that the

[1] 3 B. & A. 179.

money was loaned for the express purpose of accomplishing what the law prohibited.

In the case af Aubert *v.* Maze,[1] the plaintiff and defendant formed an illegal partnership in the insurance business, and, in an action brought by one against the other, the question arose, whether money paid by the latter for the former's share of losses could be recovered, and it was declared that it could not, and the court by way of illustration said: "If two agree to assassinate a person and hire a third to do it, and one of the former pay the whole reward, it is clear that he cannot maintain an action for a moiety." And in a similar case,[2] the court said: "A party cannot apply to a court of justice to enforce a contract founded in a breach of the law."[3]

American authorities—Federal decisions.—In the case of *In re* Green,[4] claims were made by Richard Green and James Norris against a bankrupt estate, and a motion was made to expunge the record of both of them on the ground that they arose out of gaming contracts on the price of wheat. It was insisted that both the claimants acted as agents only for the bankrupt in buying, and were not the parties selling, so, conceding the contracts to be of the character claimed, they only paid the money to the parties selling to the bankrupt; and although the purchase was made through them as agents of the bankrupt in the usual way of trade, and with knowledge of the illegal nature of the contracts, still the bankrupt is liable to

[1] 2 B. & P. 371.

[2] Sullivan *v.* Greaves, Park on Insur. 8.

[3] See also Amery *v.* Merryweather, 2 B. & C. 573.

[4] 7 Biss. 338.

them for money paid to third parties for the differences, and that it is in the nature of a claim for money paid at his request, and not within the prohibition of the act. The act of Wisconsin referred to, makes void all agreements and contracts to pay money lost on a wager either to a party winning, or to a party who advanced it to aid in the enterprise. Deciding against this view, the court said: "Reliance was placed on the case of Rosewarne *v.* Billing, 109 English Law Reporter, 316, to sustain this claim. This was an action by a broker to recover of his principal money paid by him for differences in illegal contracts for the purchase of shares of railroad stock made by the broker for the principal. The court say that no action could be maintained to recover the differences on such time contracts, but that when such losses were paid by a party at the request of the defendant, such party could recover. The court holds that such contracts are void, but not illegal, and not being illegal, a party paying at the request of the defendant could recover. But this is not the doctrine of the courts of this country. They hold them to be illegal; they say they are unlawful as in conflict with sound morals and public policy as well as inhibited by the statute. But this is not all. Our statute is broader than the English statute. The statute of this State declares all contracts, notes, or agreements for reimbursing or repaying any money knowingly advanced for betting or gaming at the time or place of the gaming or betting are void. These parties, it seems to me, fall within that statute. They advanced the money at the time to make the gaming contract, and without their aid in that respect the contracts would not have been made. So if these contracts are

gaming contracts, they must be held to have advanced the money for margins to make them, and their claim for repayment falls within the prohibited class mentioned in the act. They made the illegal contracts, and advanced the money required to give them colorable validity. To take this case out of the statute would be establishing a most flagrant evasion of its provisions."

In Cobb *v.* Prell,[1] the plaintiff was a commission merchant at St. Louis, and was employed by the defendant, who was a grain dealer of Columbia, Kansas, to sell for him certain quantities of corn to be delivered to the parties, to whom the plaintiff might sell the same, at the option of the defendant during the month of May, 1881. The plaintiff made contracts in his own name for the sale of corn, which the defendant did not deliver, and the plaintiff was obliged to, and did pay the damages resulting from such failure, to wit: the difference between the price at which the sales were made, and the price on the last day upon which the defendant could have delivered the corn, according to the contract made by him for the defendant. It was not disputed that the sales were made by the plaintiff, or that they were properly settled; but it was claimed that the defendant never intended to deliver the corn, and that the plaintiff knew this when the sales were made, but that the defendant expected to pay any losses or receive any gain that the plaintiff might make in speculating on the defendant's account. A jury was waived, and the case was tried by the court who said: "The case turns upon the question whether or not it was the intention of the parties that

[1] 15 Fed. Rep. 774.

the corn should be delivered?" Upon this point the parties flatly contradicted each other, and the court, following Barnard *v.* Backhaus, said that the burden of proof was on the plaintiff, and at the same time proceeded to examine the evidence, and found, as a fact, from the circumstance of the case that no delivery was intended. There is a statute in Kansas which makes gambling by any device whatever a misdemeanor. This case is, however, very unsatisfactory, as it has been clearly shown that the mere fact of the defendant's not intending to deliver and the plaintiff's knowledge of the same did not make the contracts made by the plaintiff for the defendant wagers. The "fundamental error" of treating the question of wager as one between the plaintiff and defendant was made, whereas the true test was as to the character of the contracts made by the plaintiff with third parties. The facts show that the sale of corn was a real sale, and that the plaintiff paid the damages for the failure of the defendant to deliver.

In Bartlett *v.* Smith,[1] the defendant, who was a wheat dealer, miller, and warehouseman, employed the plaintiffs to deal for him in the Milwaukee Chamber of Commerce. The losses amounted to about thirteen thousand dollars, to recover which the action was brought. Judge Nelson left it to the jury to say whether the contracts made for the defendant were real and *bona fide*, or merely wagers, and said, "if the jury find from the evidence that the plaintiffs, in the transactions in controversy, were brokers or factors of the defendant, and that in said transactions no actual sale and delivery of grain was contemplated, but

[1] 13 Fed. Rep. 263.

merely the payment of differences according to the rise and fall of the grain market, and that the plaintiffs performed services for the defendant, and supplied him with funds, and made advances for the express purpose of enabling defendant to engage in such transactions, and if they, as agents of the defendant, conducted such illegal ventures in their own name, they became *particeps criminis*, and the law will not aid them to recover moneys advanced for such purpose, or commissions earned in such transactions, and your verdict must be for the defendant."

In Irwin *v.* Williar, the court[1] said: "We are also of the opinion that when the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is *particeps criminis*, and cannot recover for services rendered, or losses incurred by himself on behalf of either in forwarding the transaction."[2]

American authorities—State decisions.—In the case of Tenney *v.* Foote,[3] the suit was brought against Foote as guarantor of a note for five thousand dollars made by the trustees of the Couch estate, payable to Foote, and by him transferred to S. G. Hooker & Co., and by them to the plaintiff. The defense was that the consideration for the guarantee by the defendant was an account of S. G. Hooker & Co. against him, which arose out of the following facts: In the latter part of 1874, S. G. Hooker & Co. were commission merchants in Chicago, doing business on the Board of

[1] 110 U. S. 499.

[2] See also Third Nat. Bank *v.* Harrison, 10 Fed. Rep. 240.

[3] 4 Bradw. 594.

Trade in that city. Foote was a mechanic and apparently rather ignorant and inexperienced in matters outside of his own business. He had been seized with a desire to make money fast and easy, and had employed one Adams as a factor to buy a quantity of oats for him. The oats were received and carried for some time. A loss ensued, and Foote had recourse to S. G. Hooker & Co. to act for him and adjust the matter. They did so, and the loss was adjusted at twenty-five hundred dollars, which Foote paid. Whereupon Hooker began to solicit Foote, if he wanted to deal any more, to employ him, saying that he would make some money for him. Foote, fresh from his recent experience, declared that he would handle no more grain; that he had no more money to put up, but if he would deal for him in options, and settle upon differences, he thought he would employ him. Hooker replied that he would, and an agreement was concluded to the effect that Hooker should go on and deal for Foote on the Board of Trade, but with the distinct understanding that it should be only in options, and that no property should be delivered or received on his account, but the transaction should be settled on differences. This contract was fully proved, and without any conflict in the evidence with reference to it. Section 130 of the Statutes of Illinois against gambling provides as follows: "Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, * * * shall be fined not less than $10 nor more than $1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts and shall

be void." The court, after tracing the history of options, and making the distinction between what is called in a previous chapter "pure options," being simply the right or privilege of buying or selling, and what is called a buyer's or seller's option, being the privilege of delivering or requiring a delivery within a certain specified time, the delivery being certain and the only option being as to the time of it, said: "The word 'option' as used in statutes here, taken with the context, means a mere choice, right, or privilege of selling or buying; and it is the contracting for such choice, right, or privilege of selling or buying at a future time any commodity the statute was intended to prohibit, as contradistinguished from an actual sale or purchase with the intention of delivering and accepting the commodity specified." The question then to be determined was whether the employment of Hooker & Co. was to deal in the options prohibited by the statute, or in options merely as to the time of delivery, and concluded from the fact that there was to be no delivery, in any event, of the articles dealt in, that the contracts were of the former class, and thus a mere engagement on the part of Hooker & Co. to gamble for Foote. A judgment was therefore rendered for the defendant. This decision was approved in 95 Illinois, 99. This case, upon the facts as found, was undoubtedly correctly decided, but in the case of Jackson *v.* Foote,[1] where the same transactions were considered in an action to recover upon the guarantee of another note, founded on precisely the same consideration, which had been transferred as security to a bank by the defendant, it was found by the court that this

[1] 12 Fed. Rep. 37.

employment of Hooker & Co. was to purchase and sell for the defendant goods for future delivery, where the only option was as to the time within certain limits, within which the seller was to deliver the goods sold. Such contracts did not come within the Illinois statute against options, and were not illegal, and judgment was given for the plaintiff.

In the case of Webster *v.* Sturges,[1] the action was brought to recover damages for the breach of an alleged contract for the sale and delivery of corn by the defendant to the plaintiff, entered into by the parties on the Board of Trade in Chicago. At the time of the transaction in question, the plaintiff and defendant were both members of the Board of Trade, and doing business thereon by way of buying and selling corn for future delivery. On the last of October, 1877, the plaintiff and defendant met after the conclusion of business of the board in an alley adjoining the Board of Trade building or in the hall of said building, and the plaintiff then and there sold to the defendant for the sum of twenty-five dollars an option to deliver to the plaintiff within one day twenty-five thousand bushels of corn at forty-five and seven-eighth cents per bushel. On the day following, the market going somewhat against the plaintiff, the said parties met on the Board of Trade, and thereupon agreed to change the option contract into a contract of sale, by which the defendant agreed to sell to the plaintiff twenty-five thousand bushels of corn, deliverable at any time within said month of November, at the defendant's option, at forty-three and seven-eighths cents per bushel. On the 26th of November, the market price of corn having advanced

[1] 7 Bradw. 56.

considerably, the plaintiff demanded of the defendant, in accordance with the rules of the Board of Trade, that he deposit a margin on said contract, and the defendant having failed to comply with said demand, the plaintiff on the following day, in accordance with the rules, bought in for and on account of the defendant twenty-five thousand bushels of corn at forty-nine cents per bushel, the then current price, charging the defendant with the difference between the price so paid and the price so fixed by the contract. Judgment was rendered for the plaintiff. The court said: "It is well settled that contracts, by which either party is given an option to buy or sell at a future time grain or other commodities, are gambling contracts, repugnant alike to good morals and good policy, and forbidden by the criminal statute under pain of fine or imprisonment. It is conceded that the original contract between the parties to this suit was one of the latter character. In consideration of $25, paid by Webster to Sturges, Webster sold an option or privilege to Webster to deliver to Sturges, within a fixed period of time, 25,000 bushels of corn at 43⅞ cents per bushel. This contract was utterly void, illegal, and criminal. It was a contract from which no rights could spring, but whose baleful and poisonous influence must necessarily taint and corrupt every other contract into which it was allowed to enter as an ingredient. Undoubtedly the parties, after having made such illegal contract, were at liberty to enter into another contract in relation to the same subject-matter, precisely the same as if no former contract existed. But the new contract must in no sense be a continuation or modification of the old. The old contract

must be utterly abandoned, so that neither its terms nor its consideration, nor any claim of right springing out of it shall enter into the new. The evidence, however, furnishes reasonable grounds for the conclusion that the price agreed upon in the contract of sale was merely an adoption of the prices previously agreed upon in the option contract, and that so far as the price was concerned, one contract was merely a continuation of the other." And for this reason judgment was reversed.

In Barnard *v.* Backhaus,[1] the action was brought upon a note the defendant had given to the firm of Bartlett & Mohr, through whom it came by endorsement to the plaintiff. The defendant had employed the said company, who were commission merchants in the city of Milwaukee, to buy and sell grain as his factors, and as a result losses were made, and the note sued on was given by the defendant in settlement of the same. It was claimed by the defendant, that this note, with three others, was given to the said firm, upon the following considerations, to wit: in settlement of a balance stated by the firm against the defendant for the differences in gambling contracts in grain, made by the said firm for the defendant with others at his request, which contracts made by said firm were in violation of the statute of gaming, and were false and feigned, and by which they undertook in form, to buy and sell grain for the defendant, without intending thereby either to receive or deliver the grain, but solely to wager on the market price of the same at the Chamber of Commerce, intending not to receive or deliver the grain, but to pay or receive the

[1] 52 Wis. 593.

difference between prices named in the contract and the market rate, whichever way the same would be, and in which contract, said Bartlett & Mohr pretended to the defendant they had lost the balance in the statement set forth. Judgment was given for the plaintiff in the court below. But on appeal the court found, as a matter of fact, that some of the transactions were of the character claimed by the defendant, and, upon the theory that where a part of the consideration is invalid the whole is tainted, reversed the judgment below. The court, in its opinion, says: "Now, what Bartlett & Mohr were employed to do—what the evidence shows they did do—was to enter into these gambling transactions for Backhaus. They were engaged equally with him in the transaction of illegal business; and the fact that they were executing the orders of their principal does not render their conduct any the less blameworthy. All were engaged in the furtherance of illegal objects—making contracts which were unlawful; consequently a note given for money which they paid in settlement of their contracts is tainted with illegality. A very satisfactory answer to the argument of counsel on this point is given by Judge Hopkins in *In re* Green, 7 Biss. 338, in the following language: 'They advanced the margins at the time to make the gaming contract, and without their aid in that respect the contracts would not have been made. So, if these contracts are gaming contracts, they must be held to have advanced the money for margins to make them, and their claim for repayment falls within the prohibited class mentioned in the act. They made the illegal contracts and advanced the money required to give them colorable validity. To

take their case out of the statute would be establishing a most flagrant evasion of its provisions.'" The section of the statute referred to in this case, is as follows: "Any person who shall lose or win any money, property, or thing, by gambling in any manner, by any means, or by betting upon any game, election, race, or sport or pastime, or on the issue of event thereof, or on any future contingency, or unknown result or occurrence, in respect of anything whatever, shall be punished by fine of not less than five times the value of the money, property, or thing in action so lost or won."[1] This case was approved in Everingham *v.* Meighan.[2]

In the case of Beveridge *v.* Hewitt,[3] the firm of Hewitt, Bliss & Co., of Chicago, brought their action against Beveridge for a balance of account, growing out of a series of transactions on the Board of Trade, in which they acted as the agents of Beveridge & McCurdy. The said account, with the exception of certain moneys furnished Hewitt, Bliss & Co. as margins, was made up exclusively of credits arising out of settlements of various deals and commissions for conducting the business. Between January, 1879, and April following, the plaintiffs took and closed out forty-four different deals for the defendant, involving the purchase of eight thousand seven hundred and fifty barrels of pork, eight thousand bushels of wheat, five thousand bushels of corn, and two hundred tierces of lard, and sale of a like quantity of the same commodities; such purchases and sales aggregating in value over two hundred thousand dollars. In no case

[1] Stat. of Wis. sec. 4535.

[2] 55 Wis. 355.

[3] 8 Bradw. 467.

was any property covered by these contracts actually delivered, but in every instance the deal was closed out by a counter contract in the form of a sale or purchase of the same commodity for the same delivery. The defense was that the claim grew out of these transactions carried on by Hewitt, Bliss & Co. on the Chicago Board of Trade, as the agents and brokers of Beveridge & McCurdy, and that they were unlawful and gambling. Upon these facts this case should have been decided in favor of Hewitt, Bliss & Co. under rule second, inasmuch as in Illinois there is no statute that makes wagers illegal. The most that can be said of the case in the favor of Beveridge is, that the brokers were employed to and did make wagering contracts. The court makes the "fundamental error" referred to by the court in Warren *v.* Hewitt,[1] as the evidence in this case and in that shows conclusively that the parties making the transactions on the Exchange were acting as agents and brokers, and not as principals. But the court said that the precise question involved in this case, arose in the case of Tenney *v.* Foote;[2] and so the case was brought within the operation of section 130 of the Illinois statute[3] against options and of the rule we are now considering. But it is submitted that the facts of this case are very different from those of Tenney *v.* Foote. There the principal employed the broker to deal in options which were prohibited by the statute. Here the broker was to make wagers for his principal. This whole case is very unsatisfactory and contradictory. The law is correctly stated but improperly applied, and the facts found are not justified by the evidence. Still, how-

[1] 45 Geo. 501. [2] 4 Bradw. 494 [3] *Ante*, p. 21.

ever, the facts as found by the court make the case an authority for this rule.

In the case of Whitesides *v.* Hunt,[1] the appellees were commission merchants in Indianapolis, and sued the appellant for money advanced and commissions in the purchase and sale of five thousand bushels of wheat through commission merchants in Chicago. The defendant answered that no wheat was actually purchased or sold, and that the transaction was a contract upon margins and gaming upon the future price of wheat, to be settled by paying or receiving at a future day the difference between the price of wheat then, and at the date of the contract; that the advancement of margins made were to keep the payment of differences secure, and that the contract was contrary to public policy, illegal, and void. The plaintiffs claimed $12.50 as their commissions and $287.56, the difference between the loss which accrued upon the purchase and sale of the wheat after allowing $200 which had been paid by appellant as margins. Judgment was given for the plaintiff, and upon appeal the court examined the subject in detail and with great care, and, in the course of his opinion, said: "It is insisted by the appellees that they only acted as agents of the appellant in the premises, and as such agents they paid the money at the request of appellant, and that they have a right to recover the same back, regardless of the question as to whether the contract for the purchase of wheat was legal or illegal. * * * They claimed to be commission merchants, doing business in the Chamber of Commerce at Indianapolis and through commission merchants in Chicago, under the

[1] 97 Ind. 191.

rules and regulations of the Board of Trade at Chicago; they purchased for the appellant 5,000 bushels of wheat, and paid to the said commission merchants in Chicago $200, that appellant had deposited with them as a margin. The price of wheat declined, and the defendant refused to deposit further margins to carry the 'deal;' appellees closed him out, and settled with the commission merchants at Chicago by paying them the further sum, for differences in the price, of $287.50; hence the appellees participated in, and were the chief manipulators of, the whole transaction, and well knew all the facts. If it was a valid and legal transaction they would have a right to recover back the money, which they had paid for appellant; but if the transaction was a gaming one, illegal and void, they would not have a right to recover; for if illegal, they were *in pari delicto*, and will not be aided by the court in profiting by their own wrong. They will be left where they are found, to abide the consequences of their own illegal transaction."

There are some authorities opposed to this rule.

In the early case of Faikney *v.* Reynous,[1] the plaintiff and one Richardson were jointly concerned in illegal stock jobbing, and upon a settlement of the transactions the defendant gave Faikney a bond for Richardson's share of the losses which Faikney had voluntarily paid. It does not appear that Richardson was the principal on this bond; but it is assumed that he was, and it is admitted that the payment of the losses being to compound differences, was unlawful under the English statute.[2] The statute was pleaded, but the court held on demurrer that the bond was

[1] 4 Burr. 2069. [2] Sir John Barnard's Act, *ante*, p. 14.

good, and likened the case to money lent in order to pay a play debt, or to pay off an usurious contract, or even to lend upon usury. Great stress was laid upon the distinction between an offense *malum in se* and one *malum prohibitum.* This case has not been distinctly overruled, but parts of it have, and it has been so criticised and doubted that it has little weight as an authority. The distinction made between an offense *malum in se* and *malum prohibitum* has been exploded. "Indeed, we think no such distinction can be allowed in a court of law; the court is bound, in the administration of law, to consider every act to be unlawful which the law has prohibited to be done."[1] That the action was on a bond, and therefore imported a consideration, or even if there had been one dollar paid, on the principal, that being voluntary even if it could be enforced, will not sustain this case in view of the late authorities,[1] for the fact remains that Faikney did an unlawful thing for Richardson, and that was the main consideration for the bond.

In the recent case of Lehmann *v.* Strassberger,[2] the distinction between an act *malum in se* and one *malum prohibitum* was clearly recognized. The defendant had given the plaintiffs a note for losses paid and for commissions in speculative transactions on the New York Cotton Exchange. In discussing the question of the validity of the note, while admitting that the purchases and sales were wagers under the New York statute, and that after they had been closed the defendant promised to pay, the court, upon the claim

[1] Cannon *v.* Bryce, 3 B. & A. 179; Aubert *v.* Maze, 2 B. & P. 371; Farmer *v.* Russel, 1 B. & P. 275; Woodworth *v.* Bennett, 43 N. Y. 273; Seneca Co. Bank *v.* Lamb, 26 Barb. 595.

[2] 2 Woods C. C. 554.

that the services at least were unlawful, said: "The fact that the agent includes in the note given for money paid by him for losses in an illegal transaction compensation for his services, does not taint the note. Such commissions would not avoid the note unless given for services as agent in a transaction which is not merely *malum prohibitum* but *malum in se*." It is submitted that the case did not call for the remark of the able judge who delivered the opinion, and so it is *obiter dictum*, and believed not to be law. If wagers were prohibited by the statute, the value of services in making them could no more be recovered than the losses themselves.

The case of Petrie *v.* Hannay[1] followed Faikney *v.* Reynous. The facts were as follows: The plaintiff's testator, Page, Keeble, the defendant, and two others, were jointly interested and engaged together in stock speculations. The whole of them were illegal except a transfer of one thousand dollars. They employed a broker by the name of Portis who had paid all the differences for them.[2] They came to a settlement with their broker, and Keeble paid the whole sum except eight hundred and eleven pounds, which was part of the defendant's share in the losses, and for which Keeble drew a bill on him in favor of Portis, which the defendant accepted. An action was brought on this bill against the plaintiff and he paid it. Two hundred and sixty-four pounds, part of the eight hundred and eleven pounds, was for the defendant's share of the one thousand pounds. Action was brought by the plaintiff to recover the eight hundred and eleven pounds for money paid to the defendant's use. The

[1] 3 Term R. 418.

[2] This was illegal by sec. 5, Sir John Barnard's Act, *vide* p. 15, *ante*.

plaintiff obtained a verdict for the whole amount, and a rule was obtained to show cause why the verdict should not be set aside *in toto*, or at least be reduced to the sum of two hundred and sixty-four pounds. The verdict was allowed to stand. The court could not distinguish the case from Faikney *v.* Reynous, and laid great stress upon the distinction between an express promise by one partner in an illegal business and an implied one to repay money paid for his account; and found the fact that the defendant, by accounting and accepting the bill, had expressly authorized the payment of the money for his account, and that he was bound to repay it. Buller, J., says: "I think sufficient is stated to warrant the court in drawing this inference, that the defendant consented and requested Portis to pay the difference in the stocks. And here I agree that, in the case of an illegal transaction, if one person pay money for another without an express authority he cannot recover it back. For there is a wide difference between the case of partners engaged in legal and illegal contracts. In the former, if one of the partners pay the whole of a partnership debt without any express promise from the other, the law gives him the right to recover it back in an action for money paid to the use of that other partner; and it proceeds upon this ground, that both are liable to pay. But in the case of illegal contracts, as they are not bound to pay, one of them cannot acquire a right of action against the other by paying the whole without his consent; in such cases it is necessary to have the consent and direction of that other. The question, therefore, here is, whether the court cannot infer from the evidence that the money was paid within the knowl-

edge, consent, and authority of the defendant; and I am of the opinion that the court are bound to draw that conclusion." This distinction has been repudiated in several subsequent cases.[1]

In Aubert *v.* Maze,[2] it was decided that money paid by one of two partners for the other, on account of losses incurred by them in partnership insurance, cannot be recovered in an action brought by him against the other partner: and Sampson *v.* Shaw[3] decided that "an agreement to make a corner in stock by buying it up so as to control the market, and then purchasing for future deliveries, is illegal, and the parties thereto are not partners. It can hardly be denied that such a contract would be illegal and fraudulent. No association to carry out such a purpose would be recognized at law as having any legal incidents of a copartnership."

The case of Norton *v.* Blinn[4] states the law to some extent contrary to this rule. Blinn placed in the hands of Norton at Toledo five hundred dollars to be by him invested as agent for Blinn in options on wheat in Milwaukee or Chicago. Norton purchased through his brokers five thousand bushels of wheat, and made a profit of three hundred and twenty-five dollars, which was paid to him. The transaction was merely a speculation or venture on the future price of wheat, without any intention that the wheat should be either

[1] Aubert *v.* Maze, 2 B. & P. 371; Mitchell *v.* Cockburne, 2 H. P. R. 380; Steers *v.* Lashley, 6 Term R. 61; Brown *v.* Turner, 7 Term R. 630; Woodworth *v.* Bennett, 43 N. Y. 273; Grey *v.* Hook, 4 N. Y. 449; Sampson *v.* Shaw, 101 Mass. 145,

[2] 2 B. & P. 371.

[3] 101 Mass. 145.

[4] 39 Ohio, 145.

paid for or delivered, but with the intention that settlements between the buyer and seller would be made on the differences between the price stated in the contract and the market price at the day named for delivery. Such transactions were unlawful in the States of Ohio, Illinois, and Wisconsin. An action was brought to recover this three hundred and twenty-five dollars from Norton by Blinn, and the defendant claimed that, as he had received the money, and used the same as the agent of the plaintiff in an illegal transaction, he was not bound to account for it. The question, then, for the court was, whether an agent who had transacted illegal business for his principal, and had received money belonging to his principal from such business, may defend himself in a court of law against liability to account therefor by showing such unlawful business, and his connection therewith as such agent. The court, in answering the question, said: "In the first place, the rule which denied civil remedies in such cases applies only to the parties to the illegal transaction. Public policy does not require that one engaged in an unlawful enterprise should, by pleading it, shield himself from liability for the wages of his employees, agents, or servants. It is enough that the rule should be enforced as between those who have some interest in the enterprise as principals." While doubtless it is contrary to public policy to permit employees, agents, and servants to seize or retain the property of their principals, although employed in an illegal business, we submit that that part of the opinion quoted, to the effect that the principal would be liable for wages, was *obiter dictum*, and would not, even in Ohio,

be sustained when that precise question comes up for determination.[1]

Rule IV.

WHERE A COMMISSION MERCHANT AGREES WITH HIS PRINCIPAL THAT HE WILL DEAL FOR HIS ACCOUNT, BUT THAT IN NO EVENT IS THE PRINCIPAL TO ACCEPT OR MAKE DELIVERY OF THE ARTICLES BOUGHT OR SOLD, AND THAT ONLY DIFFERENCES WILL HAVE TO BE ACCOUNTED FOR BETWEEN THEM, THIS WOULD BE A WAGER, AND THE COMMISSION MERCHANT CANNOT RECOVER LOSSES PAID, OR HIS COMMISSIONS, EVEN THOUGH, TO PROTECT HIMSELF, HE MADE REAL CONTRACTS WITH OTHERS.

Contracts such as are described in this rule are sometimes made, though they are not common; and it is to be observed that in reality the relation created by the contract between the parties, is not one of principal and agent, and so does not entitle the former to compensation and indemnity as an agent. The relation between them is really that of parties to a wager. The form of principal and agent which they assume, is fictitious; and it is clear that a contract, creating the relation of principal and agent, may be made the cover of a wager, as well as the contract of purchase and sale between principals.

English authorities.—In Cooper *v.* Niel,[2] a case coming within the rule, was supposed by way of argument, and reference is made to it in the opinion of Brett, L. J., in Thacker *v.* Hardy,[3] as follows: "In Cooper *v.* Niel, another supposititious case was put

[1] See also Marshall *v.* Thurston, 3 Lea, 741; Justh *v.* Holliday, 11 Wash. R. 418.

[2] 13 Weekly Notes, 128.

[3] 27 W. R. 158; s. c. L. R. 4 Q. B. D. 685.

before us, and I, at all events, and I think my learned brothers, dealt with it. It was suggested that the plaintiff, who was a broker, and the defendant, came to an express agreement that the broker should enter into transactions on the Stock Exchange, which might end in a gain or loss, but that, whatever happened to the broker on the Stock Exchange, he (the broker) would only obtain the differences from, or pay the difference to, the defendant. So that an express agreement was suggested between the broker and the principal to this effect: I will go to the Stock Exchange and make bargains. I know they will be real bargains, for I can only make such bargains; on them I shall be liable, though acting as your broker, for I am a principal with regard to the person with whom I deal, and I shall be obliged to pay in the end to him the real loss, or, on the other hand, entitled to receive from him the real gain, but this I will make the bargain with you, that whatever happens to me I will never make you (though in the end I may be obliged to take the shares) liable for more than the difference in price —that is, that my bargains with you shall be a gambling on the mere rise or fall in price, though I must, in order to do that, deal in the Stock Exchange in another way. I thought such a bargain as that might be within the gaming and wagering statute."

In the case of Byers *v.* Beattie,[1] the plaintiffs were stock-brokers, and they agreed with the defendant that they would buy and sell such stocks and shares as the defendant should require, as and when the defendant should direct, and on the terms that in case

[1] 16 Weekly Reporter, 279.

the price for which the shares and stock should be sold, should be greater than those for which the same should have been bought, the plaintiffs should pay the defendant the difference between said price, less the plaintiffs' commissions and charges. The defendant agreed that in case the prices for which said stock and shares should be sold, should be less than the price for which the same should have been bought, that he, the defendant, would pay the plaintiffs the difference between the last mentioned price together with the plaintiffs' commissions and charges. In pursuance of said agreement, the plaintiffs bought and sold for the defendant, as he directed, certain shares and stocks which the plaintiffs sold at prices less than the prices for which they were purchased, and brought their action to recover the differences and their commissions. The defense was that the plaintiffs never made any payment for the defendant, and it was claimed that the agreement was a wager, and void by the Statute of Victoria. Fitzgerald, B., said: "I can see nothing but a wager. * * * The sole consideration for the defendant's promise to pay the difference between the price of the sale, and the price of the purchase, in case the latter should be the greater, was the plaintiffs' promise to pay the difference, in case the former should be the greater. It seems to me that if we could imply (which I do not think we can) that the plaintiffs did, in effect, render themselves liable to the vendors or vendees, the result would be the same."

American authorities.—In this country, the later Pennsylvania cases[1] and the New Jersey case[2] are strong authorities for this rule.

[1] *Ante*, p. 268 *et seq.* [2] *Ante*, p. 274.

Rule V.

Where the relation of principal and agent is clearly shown, and the latter guarantees a market to the former, and agrees that he will so conduct and arrange his principal's business that the latter will not have to make or receive delivery of the articles bought or sold, the agent can recover his commissions and losses paid.

There is no decision known to the author fully establishing this rule, yet it is believed to be correct. Let us suppose a commission merchant to be authorized to buy grain for immediate delivery, and it is delivered. The fact that he has agreed to sell it, and guarantees a market, cannot make the transaction a wager. The fact that the purchase was for future delivery, cannot make any difference. There are cases justifying the rule.

English authorities.—In the case of Thacker *v.* Hardy,[1] Cotton, L. J., in reference to the claim of counsel for defendant, that the facts had been wrongfully found from the evidence, said: "Mr. Mackenzie said that the plaintiff's employment was not merely of the kind which exists on the findings of this case, but that the plaintiff and defendant agreed that the plaintiff should enter into these transactions, and that, whatever happened in the result, the defendant would be only liable for the difference, and Mr. Mackenzie contended that if that was the bargain it would be within the gaming and wagering act, and null and void, and that therefore, as it is in respect of that bargain that the plaintiff claims, he could not recover in this action. Even assuming that in that bargain the

[1] 27 W. R. 158; s. c. L. R. 4 Q. B. D. 685.

plaintiff is not to be treated as acting as agent, but in a certain sense as a principal, still, what gaming or wagering is there in it? The essence of gaming or wagering is that both parties stand to lose or win on the happening of some event at the time unknown to them—that is, that if the event is one way A. shall win, and if the other way that B. shall win; but there is no such element as that here. There will be no such gain to the plaintiff; his gain will not depend on how the difference in price went. If he was to have a commission, he would make it either way. If the differences were in favor of the transaction he would not win, and if the differences were against the transaction he would not lose. In my opinion, therefore, the whole element, and necessary element, of gaming and wagering is absent in any such contract as the present." The fact that a broker or commission merchant guarantees a market does not make him a principal, or the transactions gambling; because the control of the principal, a fact so much relied upon by the court in Thacker *v.* Hardy[1] still remains. The relation of principal and agent cannot exist, and at the same time the parties be principals to each other in a wager.

In Ashton *v.* Dakin,[2] the plaintiff was a stockbroker in London, and the defendant, a tea dealer in the same town. The former was employed by the latter to purchase stock for him for future delivery under the implied agreement and understanding that the plaintiff should not be required to deliver the stocks sold, or the defendant to pay for the same, but that they should be sold by the plaintiff before the

[1] 27 W. R. 158; s. c. L. R. 4 Q. B. D. 685.

[2] 32 Law Times, 300.

time for delivery arrived, and that on the resale, the defendant should only pay or receive the differences. The plaintiff bought and sold stocks upon the defendant's order, making the purchases and sales through members of the London Stock Exchange, upon which there were losses paid by the plaintiff. The plaintiff was allowed to recover these losses and his commissions. The facts of this case do not bring it precisely within the rule; but the agreement which the plaintiff made was in substance the same as guaranteeing a market. The guaranty being not that in any event a market shall be found, but that there will be one if the plaintiff wishes to sell. If the market should in either case absolutely fail, then the commission merchant would have to take the goods himself if the plaintiff required it.

American authorities.—In Jackson *v.* Foote,[1] the facts were that Foote had purchased oats for future delivery, as a speculation, dealing through a member of the Chicago Board of Trade, who took them in at the time for delivery, and afterwards sold them, and in making settlement with his agents had some difficulty with them. It was not stated in this case, but was in another[2] involving the same transactions, that the defendant's losses were quite large. The defendant availed himself of the services of Mr. Hooker of the firm of Messrs. S. G. Hooker & Co., also members of the board in settling the difficulty. Mr. Hooker advised the defendant, if he wished to speculate or deal any more on the Board of Trade, that he had

[1] 12 Fed. Rep. 37.

[2] Tenney *v.* Foote, 4 Bradw. 594.

better do it with his, Hooker's, firm. The defendant assented to this, provided he would only trade or deal in differences between the selling and buying, or buying or selling prices, of the commodities dealt in. In pursuance of this agreement the defendant, from time to time, gave orders to Hooker & Co. to buy or sell grain, pork, and lard, on the Board of Trade. These orders were executed by Hooker & Co. by making the ordinary option trades where the seller had the option of delivering the goods sold within certain months. These dealings continued for some time, Hooker & Co. buying and selling as directed by the plaintiff, and settling the differences, paying the money when the market was against the defendant, and receiving it when the market was in his favor. They charged the defendant whatever sums were paid in settling differences when they were against him, and gave him credit when they had received differences in his favor. In two or three transactions the firm seemed to have taken in, and paid for grain, and provisions bought for the defendant, and then sold them, charging the defendant with interest, storage, etc., incident to such transactions. At the time the dealings for the defendant were closed he stood debited to the firm in the sum of twenty-two thousand dollars. In payment of this the defendant transferred and delivered to Hooker & Co. four notes of five thousand dollars each, held by him against the Crouch estate, the payment of which notes he guaranteed. Hooker & Co. deposited two of these notes with the Third National Bank of Chicago as collateral security for a loan made the firm by the bank. The action was brought by the receiver of the bank on this guaranty,

and the defense was that the transactions between the defendant and Hooker & Co. were gambling and illegal under the Illinois Statute against options. The court, after remarking that he was satisfied that Hooker & Co., were not employed to deal in the kind of options prohibited by the Illinois statute, but in "time contracts," in which the seller had the option to deliver within certain limited time, said that Mr. Hooker "seemed to have explained to the defendant, how by reason of his many customers, some of whom were sellers and others buyers on the market, he could so manage the defendant's deals that he need not take any commodity bought, but could settle simply the difference between the purchase price and the market price. * * * He intended, without doubt, that his broker would so manage his trades that differences would be paid or collected instead of his taking or holding the article dealt in, or having his brokers do it for him and at his expense." The decision did not turn, however, on this question. The plaintiff was held entitled to recover on the ground that the bank was a *bona fide* owner of the notes, and at most the transactions between the defendant and Hooker & Co. were merely void, but the court said: "It is extremely doubtful in my mind, even if suit had been brought by Hooker & Co. against the defendant, he could, by the showing now made upon this trial, have successfully defended against this claim." If this case had turned upon the rights of Hooker & Co., it is evident that the court would have fully sustained the rule we are now considering, inasmuch as the original agreement was that the defendant should only deal in differences, and at the same time it is clear that Hooker & Co. were to

make, and did make, real contracts on the Board of Trade for the benefit of the defendant. In order to make differences only payable by the defendant a market must be provided by the plaintiff. In nearly every speculative transaction through an agent the party speculating does not intend to make or receive delivery himself of the articles dealt in, as he intends to sell out or buy in before the time for delivery arrives, and for the agent to guarantee that he will be able to do both, does not make the relation between himself and his principal a cover for a wager. It is believed that contracts of this nature are not uncommon, though it is not wise to make them, as the distinction between the facts required to bring a case within this rule, and rule IV, is quite narrow.

Rule VI.

WHERE A PERSON LOSES A WAGER, AND REQUESTS ANOTHER TO PAY IT, AND THE OTHER DOES PAY IT, OR LOANS MONEY FOR THAT PURPOSE, AN ACTION CAN BE MAINTAINED TO RECOVER THE MONEY PAID OR LOANED; AND THIS IS SO, EVEN THOUGH THE WAGER WAS UNLAWFUL, PROVIDED THE PERSONS PAYING OR LOANING THE MONEY WAS NOT ALSO A PRINCIPAL OR AGENT IN MAKING THE SAME, AND PROVIDED ALSO THE PAYMENT ITSELF IS NOT PROHIBITED BY LAW.

English authorities.—In Faikney *v.* Reynous,[1] the action was to recover money paid by one party for the share of the other in joint stock jobbing operations, and it was held it could be recovered, and the court likened the case to money lent to pay off a usurious debt, or even to lend upon usury.

And in Petrie *v.* Hannay,[2] it was decided that if

[1] 4 Burr. 2069.

[2] 3 Term R. 418.

two persons jointly engaged in stock jobbing transactions employed a broker who paid the differences, and one of them repay the broker the whole sum with the privity and consent of the other, he may recover a moiety from the other in an action for money paid to his use.

These two cases have been substantially overruled[1] on the ground that they came distinctly within the provisions of Sir John Barnard's Act[2] prohibiting the payment of differences in stock jobbing operations, but they are still good authorities for the first part of the rule. The cases that overrule them are authorities for the second part, because the money was loaned for the express purpose of violating a penal statute to wit: The payment of differences in stock jobbing operations, and because also both parties were joint principals in the stock jobbing. These cases were approved in Clarke *v.* Foss,[3] Gilbert *v.* Gauger,[4] Armstrong *v.* Toler,[5] and Lehmann *v.* Strassberger.[6]

Whether the request to pay was before or after the loss was ascertained makes no difference.

In Rosewarne *v.* Billing,[7] which was an action to recover money paid by the plaintiff for the defendant at his request, and where the defense was that the money was paid for and on account of wagering transactions in Eng-

[1] Cannon *v.* Bryce, 3 B. & A. 179; Aubert *v.* Maze, 2 B. & P. 371; Farmer *v.* Russell, 1 B. & P. 295; Mitchell *v.* Cockburne, 2 H. B. 379; Steers *v.* Lashley, 6 Term R. 61; Brown *v.* Turner, 7 Term R. 630; Woodworth *v.* Bennett, 43 N. Y. 273; Gray *v.* Hook, 4 N. Y. 491; Seneca Co. Bank *v.* Lamb, 26 Barb. 295; Sampson *v.* Shaw, 101 Mass. 145.

[2] *Ante*, p. 14.

[3] 7 Biss. 540.

[4] 8 Biss. 214.

[5] 11 Wheaton, 258.

[6] 2 Woods C. C. 554.

[7] 15 C. B. (N. S.) 316.

land, where wagers were simply void, Earle, C. J., said: "I am of opinion that our judgment upon this demurrer must be for the plaintiff. He sues the defendant for money which he alleges he paid for the defendant at his request. * * * I am clearly of opinion, that, if a man loses a wager, and gets another to pay the money for him, an action lies for the recovery of the money so paid. In Jessopp *v.* Lutwyche,[1] and Knight *v.* Cambers,[2] the Court of Exchequer and this court both say that the plaintiff was entitled to judgment on the ground that the money was alleged to have been paid at the request of the defendant. * * * I should incline to think, that, if one requests another to make a wagering contract on his account, and pay the loss, if loss happens, that would be a continuing request to pay until revoked. * * * It is sufficient to say that there is nothing upon the face of this plea to exclude the notion of a subsequent request to pay. * * * Whether the request to pay was after the loss was ascertained, it must have the same obligatory force."

In the case of Jessopp *v.* Lutwyche,[1] Parke, B., in the course of the argument, said: "The plea does not negative the fact of a third party having won the money, and that the defendant requested the plaintiff to pay the amount over to him. The plea therefore is not inconsistent with the state of facts which entitle the plaintiff to recover." And in giving judgment he said: "It is consistent with the plea that the defendant requested the plaintiff to pay over the money for

[1] 10 Exch. R. 614. [2] 15 C. B. 562.

him to a third party, and that in fact it was so paid; in which case the defendant has no defense."

Knight *v.* Cambers[1] was substantially the same as Jessopp *v.* Lutwyche. There it was held that it was no answer to an action for money paid by the plaintiff for the defendant's use at his request, that the money was paid in respect to losses on wagering contracts made void by the Statute of Victoria,[2] and Maule, J., said: "Assuming the original contracts to have been void, there is nothing to prevent the plaintiff from recovering money afterwards paid by him at the defendant's request."

In Read *v.* Anderson,[3] it was decided that if a person employ another to make bets in the other's name, an implied authority to pay, if the bets are lost, is coupled with the employment; and the moment the bet is made the authority to pay it, if lost, becomes irrevocable. In Rosewarne *v.* Billing,[4] the same thing is suggested.

In Oldham *v.* Ramsden,[5] an action was brought to recover money paid for bets, where it appeared that the plaintiff, a betting agent, made bets on horse races at the request of the defendant. The bets were lost and paid by the plaintiff. It was held that he could recover. In *Ex parte* Pyke, *in re* Lyster,[6] it was held that money lent to enable the borrower to pay a bet which he had already lost, could be proved against the borrower in bankruptcy proceeding. In Bubb *v.* Yelverton,[7] it appeared that a testator had requested

[1] 15 C. B. 562.
[2] *Ante*, p. 13.
[3] 32 Weekly Reporter, 950.
[4] 15 C. B. (N. S.) 316.
[5] 44 L. J. C. P. 309.
[6] L. R. 8 Ch. D. 754.
[7] 24 Law Times, 822.

a friend to bet for him on certain horse races, and the friend had paid the amount lost by the bets. It was held that the request to bet implied an authority to pay the bets if lost, and that the friend was entitled to prove his claim against the testator's estate for the amounts paid by him in respect to the bets. And in Thacker *v.* Hardy,[1] it was said that money paid in discharge of a bet is a good consideration for a bill of exchange.

American authorities—Federal decisions.—In Lehmann *v.* Strassberger,[2] the court said: "This is the case, to put it in its strongest light for the defendant, of an agent who advances money to his principal to pay losses incurred in an illegal transaction, and takes his note for the money so advanced. In such a case, the contract between the principal and agent, made after the illegal transactions are closed, although it may spring from them and be the result of them, is a binding contract."

In Warren *v.* Hewitt,[3] the court stated the law to be that where one, acting as an agent in making wagering contracts, made advances, he may recover the same where the contracts are executed and the principal ratified them.

In the case of Armstrong *v.* Toler,[4] it was held that where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. So if a contract be in part only connected with the illegal contract and

[1] 27 W. R. 158; s. c. L. R. 4 Q. B. D. 685.
[2] 2 Woods C. C. 554.
[3] 45 Geo. 501.
[4] 11 Wheat. 258.

growing immediately out of it, though it be in fact a new contract, it is equally tainted by it; but if the promise be entirely disconnected from the illegal act, and is founded in a new consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act.

In Clarke *v.* Foss,[1] the court said: "If the original contracts for the sale of grain were liable to the taint of illegality as charged, it does not necessarily follow that the notes and the mortgages executed by one of the principals in the transactions, to secure the payment of money previously advanced by their agent to pay losses springing out of, and resulting from those original transactions, are tainted with the same vice."

And in Gilbert *v.* Gauger,[2] it was said: "While it may be well, as a matter of public policy, to prevent parties from gambling by refusing to enforce gambling contracts between them, yet it is at least doubtful whether they should be allowed to gamble at the expense of others, and not pay those whom they employ to do the work, and advance money for them."

In the case of *In re* Green,[3] where a claim was made against a bankrupt estate for money paid out by a broker in gambling wheat transactions, as it was claimed, the court said: "If the bankrupt had requested the party to pay the differences for him after the loss, and such party had not been an actor, nor aided or assisted in the unlawful dealings out of which the loss grew, there would be some reason in allowing him to re-

[1] 7 Biss. 540.

[2] 8 Biss. 214.

[3] 7 Biss. 338.

cover. He would be an innocent party. In such case the consideration would not, as to him, be illegal."

American authorities—State decisions.—In Durant *v.* Burt,[1] an action was brought by a broker against his principal for money paid at the principal's request. The evidence showed that the plaintiff received an order from the defendant to buy stock on time for the defendant, and that the plaintiff bargained with third parties for the stock so as to render himself personally liable for the price thereof, and then gave notice of the purchase and price to the defendant, who signified his assent thereto, and afterwards, before the end of the time limited in the contract for delivery, in reply to the plaintiff's requests for the advance of money due himself as a margin for security against loss by a depreciation of the market price of the stock, the defendant said it would be all right. This was held sufficient to warrant a finding that the defendant knew the plaintiff had rendered himself liable for the contract price, and ratified the arrangement. At the end of the time limited in the contract, the plaintiff took and paid for the shares, the principal having failed to do so, and then, after informing the principal, and vainly requesting him to take the shares and pay for them he sold them, the defendant at no time repudiating his agency or objecting to his proceedings. It was objected that it did not appear that the party, of whom the shares were bought, was at the time of such bargain the owner or assignee of the shares, or authorized by the owner or assignee or his agent to sell or

[1] 98 Mass. 161.

transfer the same. By the Massachusetts statute against short sales it is provided that a party selling shares must own them or be authorized to sell them by some one else who has them. But the court said that "this doctrine had no application to a case like the present one, in which the agent had paid money for his principal at his request and seeks reimbursement."

In the case of Wyman *v.* Fiske,[1] where the mutual accounts of the parties were adjusted by an auditor, it appeared in reference to one of the items that the plaintiff, through a broker, sold stock contrary to the statute of Massachusetts against short sales, and made a loss. The defendant paid the same and took the plaintiff's note therefor. It was admitted the transactions of the plaintiff through his broker were illegal, but having made the loss and chosen to reimburse his broker, it was held he had a perfect right to do so, and if he procured another person to pay the loss, and gave his note in consideration thereof, that the note was valid and properly allowed by the auditor.

Where the payment is itself made unlawful by a statute, the money paid or loaned for the purpose of payment cannot be recovered. An instance of this is to be found in Sir John Barnard's Act,[2] where the payment and compounding of differences in stock jobbing transactions is prohibited under severe penalties.[3]

[1] 85 Mass. 234.

[2] *Ante*, p. 14.

[3] The cases cited under rule II are authorities also for this rule.

Rule VII.

Money advanced, loaned, or paid for the express purpose of being applied to an illegal object, cannot be recovered.

English authorities.—In Petrie *v.* Hannay,[1] the court said: "If one of two partners advance money in a smuggling transaction, he cannot recover his proportion of it against his partner, because the transaction is prohibited.

In the case of Aubert *v.* Maze,[2] the parties were engaged in illegal insurance business, and an arbitrator found "that the plaintiff is indebted to the defendant in the sum of £680, 2*s.*, being a moiety of divers sums of money paid by the defendant for and on account of losses on policies of insurance, underwritten by agreement between the said plaintiff and the defendant at their joint risk and for their joint benefit." On a rule *nisi* to set aside this award, it was held that this item could not be allowed in favor of the defendant, on the ground that the money was paid in furtherance of an illegal purpose.

In Cannan *v.* Bryce,[3] it was decided that money lent and applied by the borrower for the express purpose of settling losses on illegal stock jobbing transactions, to which the lender was no party, cannot be recovered by him. Amos, one of the partners, on his personal account, had made losses in stock jobbing transactions, and the defendant loaned him the money for the purpose of paying them. The two partners

[1] 3 Term R. 418.
[2] 2 B. & P. 371.
[3] 3 B. & A. 179.

joined in a bond to repay this money loaned. Afterwards cargoes of goods were assigned to the defendant to be applied by him on the bond, and were so applied. Afterwards the defendants committed acts of bankruptcy, and an action was brought by their assignee to recover the proceeds of the cargoes. By the statute against stock jobbing the payment of differences for not transferring public stock was prohibited under a penalty. The court decided that the plaintiff must recover, and said: "It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object."

In Steers *v.* Lashley,[1] the defendant had engaged in unlawful stock jobbing transactions through a broker who had paid the losses. A dispute as to the account having arisen between the defendant and the broker, the matter was referred to the plaintiff and two others who awarded the broker £306, 12*s.* 6*d.* For a part of this the broker drew his bill of exchange on the defendant, and it was endorsed over to the plaintiff. It was held that, as the money had been paid to settle differences in stock jobbing operations, and as the plaintiff knew this he could not recover.[2]

American authorities.—Where money was voluntarily paid on account of an unlawful business, it cannot be recovered.

In Wyman *v.* Fiske,[3] the mutual accounts of

[1] 6 Term R. 61.

[2] *Sed vide* Farmer *v.* Russell, 1 B. & P. 295.

[3] 85 Mass. 234.

the parties were investigated by an auditor. It appeared that in one transaction a note was given by the plaintiff, and it was claimed by the plaintiff that it was for the balance of short sales of stock contrary to the Massachusetts statute which made such sales unlawful, and that the plaintiff had directed the defendant to apply on account of said note, money that he, the defendant, had in his hands, and that this note could not be allowed in favor of the defendant, and that the plaintiff should be credited with the sums which he had directed applied to this note, but the court said: "Money thus paid cannot be recovered back, either at common law or by the provisions of the statute, and that the appropriation of the money by the defendant's consent was equivalent to a voluntary payment."

In Ruckman *v.* Bryan,[1] and in Peck *v.* Borgie,[2] it was decided that money knowingly lent to be staked upon the event of a horse race cannot be recovered. And in White *v.* Buss,[3] it was held that money loaned for the purpose of gaming at cards could not be recovered in an action at law.[4]

Mere knowledge that money was borrowed to be used for an illegal purpose will not defeat a right of recovery.[5]

[1] 3 Denio, 340.

[2] 3 Denio, 107.

[3] 57 Mass. 448.

[4] The cases cited under Rule III are authorities also for this rule.

[5] Marshall *v.* Thurston, 3 Lea, 741.

Rule VIII.

If an agent in the prosecution of an illegal enterprise receives money or other property belonging to his principal, he is bound to account and turn it over to the principal, and cannot shield himself from liability therefor on the ground of the illegality of the business in which he is employed.

English authorities.—A leading authority for this rule is Tenant *v.* Elliott,[1] where the defendant, a broker, effected an illegal insurance for the plaintiff on a ship, and after the loss the underwriters paid the amount of insurance to the defendant, who refused to pay the same to the plaintiff on the ground that the insurance contract was illegal. Judgment was given for the plaintiff, and Buller, J., said: "Is the man who paid over the money to another's use to dispute the legality of the original consideration? Having once waived the illegality, the money shall never come back into his hands again. Can the defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over to? Who is entitled to it but the plaintiff?"

In the case of Farmer *v.* Russell,[2] the defendant was a common carrier, and agreed to carry and deliver to a third party goods not to be delivered till paid for, and the carrier was to receive two cents on the pound on the goods carried as a commission. The goods were counterfeit half pence, and designed for circulation. The defendant collected the money and accounted to the plaintiff for all excepting £13, the subject of this suit, and claimed that he was not bound to account for it on the ground that the sale of the counterfeit money

[1] 1 B. & P. 3.

[2] 1 B. & P. 295.

was unlawful. The verdict was given for the defendant. There was some evidence to show that the defendant knew the character of the goods which he transported. On appeal, Buller, J., said: "I think the knowledge and participation of the defendant is not made out by the evidence reported, nor indeed if it had been would it have made any difference in the case of an action for money had and received, which is not founded on an illegal contract, but on a ground totally distinct from it." The judgment was reversed.

Beeston *v.* Beeston [1] was an action on a check, and the defendant pleaded that he had delivered the check to the plaintiff in respect of money alleged to be due from the defendant to the plaintiff upon a contract made between them by way of wagering, wherein it was agreed that the plaintiff should pay to the defendant certain money, and that the defendant should employ it and certain money of his own in making bets and wagers upon the result of certain horse races, and should pay to the plaintiff a certain proportion of the winnings. It was held that the plaintiff was entitled to recover. Cleasby, B., after remarking that the Statute of Victoria [2] made contracts of bets only void, said: "Now the cause of action here, whether on the check or on the account stated, is that the defendant had received money for which he ought to account, because he has agreed to do so. Why is he not bound to account? It is said that the statute prohibits such an agreement as the present, but all that it professes to deal with are contracts for wagering. I think, therefore, that this is not an attempt to recover under a contract by way of wagering, and that the plaintiff is not precluded from recovering."

[1] L. R. 1 Exch. D. 13.

[2] *Ante*, page 13.

American authorities.—Norton *v.* Blinn [1] is a leading authority for this rule. In that case the plaintiff employed the defendant to invest five hundred dollars in unlawful wheat options, and the defendant did so, making a profit of three hundred and twenty-five dollars. Upon an action for this money it was held that he could recover, and the court said: "It is contrary to public policy and good morals to permit employees, agents, or servants to seize or retain the property of their principals, although it may be employed in illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons in those relations. In Brooks *v.* Martin, 2 Wall. 70, it was held by the Supreme Court of the United States 'that after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners was passed into other forms—the results of the contemplated operations completed, a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract.' In Baldwin *v.* Potter, 40 Vermont, 402, it was held: 'That an agent is bound to account to his principal for money received in the course of his agency for goods sold by his principal on orders obtained by him as such agent on commission, although such sales as between the principal and purchaser be illegal and void.' In Evans *v.* Trenton, 3 Zab. 764, it was held 'the mere agent of a party to an illegal transaction cannot set up the illegality of the transaction in a suit by his principal to recover money that has been paid to such agent for his principal on

[1] 39 Ohio, 145.

account of the illegal transaction. This defense can be set up only by a *party* to the illegal transaction.' In this case the illegal transaction was accomplished through the agent. See also Wood on Masters and Servants, section 202, where it is held: 'While the courts will not enforce an illegal contract, yet, if a servant or agent of another has, in the prosecution of an illegal enterprise for his master, received money or other property belonging to the master, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction.'"

In Woodworth *v.* Bennett,[1] the court says: "It has been settled that a party who pays money to a third person for the use of another, which, on account of the illegality of the transaction he was not obliged to pay, such third person cannot interpose the defense of illegality. This principle is based upon the undoubted right of a person to waive the illegality and pay the money; and when once paid, either to a third party directly or to a third person for his use, it cannot be recalled; and that the third person, who was in no way connected with the original transaction, cannot avail himself of a defense which his principal saw fit to waive."

In Warren *v.* Hewitt,[2] the court says, in considering whether the plaintiff could recover for money paid in settlement of contracts void in law, that "had a profit been made on the transaction, it is clear that Hewitt would have been compelled to pay it over to him."

[1] 43 N. Y. 273.

[2] 45 Geo. 501.

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